Supreme Court, U. S.
FILED
FEB 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1980

No. 79-1239

SIDNEY A. SPARKS AND R. L. LYND,
D/B/A SIDNEY A. SPARKS, TRUSTEE

Petitioners,

v.

DUVAL COUNTY RANCH COMPANY, INC.
CLINTON MANGES, ORVILLE DENNIS,
CLARENCE MARTENS, AND O. P. CARRILLO

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE COURT OF APPEALS ERRED IN THE FOLLOWING RESPECTS:

A. In not holding that a state judge, who performs a corrupt judicial act in exchange for a bribe and is held disqualified thereby, acted in a clear absence of all jurisdiction

1. Jurisdiction is power. The judicial acts of a disqualified judge are absolutely void. If all a judge can do in a matter before him is to enter void orders, he is without power, and therefore jurisdiction is clearly absent

2. The surrender by a judge of the independence of his judicial mind in exchange for a bribe does not invite application of the doctrine of immunity as a matter of public policy

B. The doctrine of immunity, designed to protect and preserve independence of the judicial mind, should not be applied to accord immunity to a judge who has in exchange for a bribe wilfully surrendered the independence of his judicial mind and rendered it servile to the will of corrupt elements of society

C. In not regarding as dicta, and not binding statements in prior cases to the effect that judicial immunity applies, no matter how corrupt the judge's acts may be, when in fact the judge's in no such prior case was guilty of bribery, or any other disqualifying or impeachable offense, as here

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Sidney A. Sparks and R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, pray that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals En Banc on October 22, 1979 which held O. P. Carrillo immune from liability under 42 USC Section 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit En Banc dated October 22, 1979 is reported in 604 F2d 976. (Appendix, p. 1-15) The opinion of the panel dated January 17, 1979 is reported in 588 F2d 124. (Appendix, p. 16-18) The opinion of the district court dated December 17, 1976 and judgment dated December 20, 1976 are unreported, but is included in the Appendix at pages 19 to 22.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit En Banc was entered on October 22, 1979. A timely motion for rehearing was denied on December 14, 1979. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 USC Section 1254(1).

QUESTIONS PRESENTED

In a situation where a state judge, in exchange for a bribe, joins a conspiracy to misuse his office to aid a litigant take property of the plaintiff in violation of 42 USC Sec. 1983, the following questions are presented.

1. Is there a clear absense of jurisdiction where the judge is adjudged to be disqualified for having accepted a bribe from one of the litigants, thereby destroying his power to enter other than void orders?

2. Should the doctrine of immunity, designed to

preserve independence of the judicial mind, be applied in aid of a judge who wilfully surrenders the independence of his judicial mind and subordinates his judicial will to the will of a litigant in exchange for a bribe?

3. May prior judicial pronouncements that judicial immunity applies no matter how corrupt the judge's acts be regarded as dicta, and not applicable in a case of ultimate judicial corruption where the judge, in exchange for a bribe, enters a corrupt order depriving plaintiffs of the property?

STATUTES INVOLVED

The statutes and constitutional provisions involved are 42 USC, Section 1983, Texas Constitution, Article 16, Section 41, U.S. Constitution, Article 2, Section 4, Texas Constitution, Article 15, Section 6, and Texas Constitution, Article 5, Section 11. (For full text, see Appendix, p. 23-24)

STATEMENT OF THE CASE

State Judge O. P. Carrillo, after a series of hearings, was by order entered on May 20, 1973, found to have been disqualified as of February 1, 1971 to act in a matter in which Clinton Manges was involved, because the transactions between Manges and Carrillo amounted to a gift. (See Complaint, Appendix, pages 25-43, wherein the gifts are described at pages 27-28, and finding of a gift appears at p. 37-41. The order adjudicating disqualification is at p. 42-43). The Texas

Constitution defines bribery as acceptance of a gift (Article XVI, Sec. 41, see Appendix p. 23). While the bribery and disqualification were found in a civil suit in which respondents were not parties (Appendix p. 28) and subsequent to the issuance of the wrongful injunction here complained of (Appendix p. 30) the bribe was given by the defendant Manges, sole owner of Duval County Ranch Company, Inc. (hereafter DCRC) and received by the defendant Judge O. P. Carrillo, at a time prior to January 18, 1973, the date on which Judge Carrillo entered the wrongful injunction in favor of DCRC against respondents. Thereafter, the injunction was dissolved on June 25, 1975. (Appendix p. 32; for full text of *Winslow v. Duval County Ranch Company, Inc.*, 519 SW 2d 717, Tex.Civ.App. 1975, writ ref. n.r.e. See Appendix p. 44-53, at p. 52) This decision resulted in respondent's three producing wells being shut down for 33 months.

This case was filed on January 6, 1976 in the U.S. District Court for the Southern District of Texas alleging jurisdiction under 42 USC, Section 1983. Plaintiffs complain that they were unlawfully enjoined from operating three oil and gas wells on an 80 acre tract of land. These wells produced from a small, shallow reservoir so that the petroleum products that plaintiffs could have produced during the stay were drained and lost to plaintiffs, since other operators producing from the same pool were not similarly enjoined.

The plaintiffs seek under 42 USC, Section 1983 to recover damages for loss of such production, a constitutionally protected right, against Judge Carrillo, who entered the unlawful order in exchange for the bribe given by the defendant Manges, and the corporate and private persons who participated in the conspiracy.

REASONS FOR GRANTING THE WRIT

This is not a case of a judge in the free exercise of his independent judicial will having, through error, entered a wrong order. It is a case where a judge, in exchange for a bribe, gave up the independence of his judicial mind, and agreed to aid the defendants DCRC and Manges take plaintiffs' property through abuse of his judicial office, as found in *Winslow* (Appendix p. 51-52) by granting the unlawful injunction as Judge of the 229th District Court of Duval County, Texas, not based on law and evidence lawfully presented, but in pursuit of the conspiracy with other defendants unlawfully entered into.

The bribery proved in a state court of competent jurisdiction, as reflected by order entered on May 20, 1972 (Appendix, p. 42-43) established that the judge was disqualified to sit in matters involving defendant Manges from and after February 1, 1971. Thus the disqualification existed for 27 months before the fact of the judge's involvement was discovered and proved.[1]

---

[1]The history of Judge O. P. Carrillo's removal by impeachment by the Texas Legislature, and his removal from office by the Texas Supreme Court on initiation by the Texas Judicial Qualification Commission is reviewed in *In Re O. P. Carrillo, District Judge*, Tex. Sup.Ct. 1976, 542 SW.2d 105. His background involvement in the corruption in Duval County, Texas is discussed in *Parr v. U.S.*, 265 F.2d 894, 5th Cir. 1959, wherein Carrillo, with his brother, Oscar, and father, D. C. Chapa, all officers of the Benevides Independent School District, were convicted, along with a number of other defendants, of fraud of the school district through an unlawful conspiracy in violation of 18 USCA Sec. 1341. The convictions were reversed by the U.S. Supreme Court June 13, 1960 as reported in 363 U.S. 370, 4 L.ed.2d 1277, 80 S.Ct. 1171, with a strong dissent by Justices Frankfurter, Harlan and Stewart.

The disqualification, although known by Judge Carrillo and both defendants Manges and DCRC, on January 18, 1973, the date of the injunction here complained of, was not then known to plaintiffs.

Under Texas law, the acts of a disqualified judge are absolutely void. *Slavin v. Wheeler, et al.*, Tex.S.Ct., 1882, 58 Tex. 23; *Fry, et al. v. Tucker, et al.*, Tex.S.Ct., 1947, 202 SW.2d 218. Jurisdiction is power, or as defined in Webster's Dictionary:

> The legal power or authority of doing justice in cases of complaint; the power of executing the laws and distributing justice; as certain suits or actions, or the cognizance of certain crimes, are within the jurisdiction of a court, that is, within the limits of its authority or commission.

Consequently, when Judge Carrillo accepted a bribe from Manges, he thereby disqualified himself from any judicial acts involving Manges, and rendered any such judicial act performed by him void. If his acts are void, he is without power, and therefore a clear absense of jurisdiction exists. The Supreme Court has consistently held that immunity applies only when the judge acts within his jurisdiction. In absense of jurisdiction, there is absense of immunity. *Bradley v. Fisher*, S.Ct. 1872, 13 Wall 335, 20 L.ed. 646; *Pierson v. Ray*, S.Ct. 1967, 386 U.S. 547, 18 L.ed.2d 288, 87 S.Ct. 1213; *Stump v. Sparkman*, S.Ct. 1978 435 U.S. 349, 55 L.ed.2d 331, 98 S.Ct. 1099. This does not mean that a qualified judge sitting as Judge of the 229th District Court of Duval County, Texas would not have jurisdiction to enter injunctions, and do other acts assigned to the jurisdiction of said court. The suit is not against the judicial district, or the robe, but the occupant of the robe, the person of the judge himself.

When a judge has, by deliberate, corrupt actions destroyed his power to do other than enter void orders, he has destroyed his jurisdiction and he acts in a clear absense of jurisdiction. It would be fiction to say that the jurisdiction available to the person of such a judge is the same as that fixed by law for his court. To then hold that a judge who has thus compromised his independence is protected by the doctrine of immunity is to apply the doctrine to accomplish the exact opposite of its purpose.

Under both the Texas and U.S. Constitutions, bribery is an impeachable offense, and the judge is not only disqualified to perform other than void acts as between the parties here involved, but being subject to impeachment, he should not be sitting in any cases. U.S. Constitution, Article II, Section 4; Texas Constitution, Article 16, Section 41, Article 15, Section 6 and Article 5, Section 11 (Appendix p. 1-2); and *In The Matter Of O. P. Carrillo, District Judge*, Tex. S.Ct. 1976, 542 SW.2d 105. To throw the umbrella of immunity over a judge under these circumstances is a mockery of the only valid argument for judicial immunity: preservation of independence of the judicial mind.

It is a maxim of democracy that a dictatorship can be established in a local area only through a secret alliance with the judge, which converts a government of laws into a government of men, but worse, a government of willful and unlawful men. To accord judicial immunity under these circumstances would encourage criminal and unlawful elements of society to interest themselves in the electoral and appointive process of judges, as amply demonstrated by the sordid history of

machine politics in Duval County. To so apply the doctrine of immunity would defeat its purpose, bemean the judiciary and subject it to suspicion and ridicule.

We concede that the courts have, in propounding the doctrine of immunity, used expansive language paraphrased that a judge is immune no matter how corrupt his acts may be. While we do not argue with the holding of the courts in the facts before them, careful examination of such cases reveals that in no case heretofore brought before the court was the judge guilty of the complete subordination of his judicial mind to the will of corrupt forces of society, in exchange for a bribe. While broad language does appear in many cases, we submit that it is careless, improvident and unfortunate language; that it is dicta and is not controlling.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDIX

Sidney A. SPARKS, R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, Plaintiffs-Appellants,

v.

DUVAL COUNTY RANCH COMPANY, INC., et al., Defendants-Appellees.

No. 77-1249.

United States Court of Appeals, Fifth Circuit.

Oct. 22, 1979.

In an action brought under the 1871 Civil Rights Act against a former state court judge and others, the United States District Court for the Southern District of Texas, at Corpus Christi, Owen D. Cox, J., dismissed the complaint, and plaintiffs appealed. The Court of Appeals, 588 F.2d 124, affirmed. On reconsideration en banc, the Court of Appeals, Gee, Circuit Judge, held that coconspirators act under color of law and can be sued for damages in an action brought under the Civil Rights Act of 1871 when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme.

Affirmed in part and reversed in part.

Coleman and Ainsworth, Circuit Judges, with whom Roney and Hill, Circuit Judges, joined, filed a dissenting opinion.

Garland F. Smith, Weslaco, Tex., Patrick G. Rehmet, Alice, Tex., for plaintiffs-appellants.

Finley L. Edmonds, Corpus Christi, Tex., for Dennis.

Mark White, Atty, Gen. of Tex., Laura J. Martin, Austin, Tex., for Carrillo.

Clarence Martens, pro se.

Raul Garcia, Alice, Tex., for Manges and Duval County Ranch.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

GEE, Circuit Judge:

We consider this case en banc to review the holding of our panel that private citizens, in conspiring with a state judge, did not conspire with any person against whom a claim valid under 42 U.S.C. §1983 could be stated and thus themselves were entitled to dismissal of claims made against them under that statute. The panel, like the district court, acted under constraint of our prior opinions, opinions that it could not properly overrule. We can and do.

[1] The material allegations in this case are set out in the panel opinion, 588 F.2d 124, 5 Cir., and we restate only those necessary to an understanding of our present holding.[1] It is asserted that state judge O. P.

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*Judges Johnson, Garza, Henderson, Reavley, Politz, Hatchett, Anderson and Randall did not participate in the consideration of or decision in this case. The case was taken under submission by the court en banc on June 5, 1979.

[1] The allegations set out in the panel opinion and partially restated here are merely the unproven assertions of the complaint that must be taken as true in the posture of this case, the complaint having been dismissed for failure to state a claim upon which relief could be granted even if the allegations proved true.

Carrillo conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to grant, prohibiting plaintiffs from producing certain oil. It is claimed that one of the defendants, Manges, bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. Carrillo was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed. *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Under the authority of a line of cases,[2] commencing in 1970 with *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970), the private defendants obtained dismissal of the complaint's claims against them as well. It is these cases, insofar as they extend a derivative immunity to private persons who conspire with judges, that we overrule today.

We are met at the outset by several technical arguments questioning the propriety of our addressing, and perhaps our power to address, the issue of derivative immunity that we decide today. It is said that the matter was not raised below and, if so, was not properly pleaded; was not raised in briefs to our panel; and was not taken en banc by us within the applicable time limits.

[2] As for the district court pleadings, we have

[2] *Slavin v. Curry*, 574 F.2d 1256 (5th Cir.), *modified on other grounds*, 583 F.2d 779 (1978); *Perez v. Borchers*, 567 F.2d 285 (5th Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 109, 58 L.Ed.2d 126 (1978); *Humble v. Foreman*, 563 F.2d 780 (5th Cir. 1977); *Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970).

examined them and find the matter sufficiently raised and properly pleaded. Whatever immunity the private defendants derived from Judge Carrillo was a matter of defense for them to plead. It was not necessary that plaintiffs negative this or any other defense in their pleadings. The first amended complaint asserts the existence of a conspiracy in considerable detail; and while we agree that mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss, *Slotnick v. Staviskey,* 560 F.2d 31 (1st Cir. 1977), we think the plaintiffs' pleadings sufficiently stated the facts on which they relied.[3]

[3] We have also examined the briefs to the panel. Appellants show the private party defendants as appellees and certify them as persons interested in the appeal's outcome. The briefs of the two appellees who filed, which were adopted by the other appellees,

[3] Appellee Dennis, for example, complains that the pleadings as to him were insufficient. They were:

> MANGES, knowing that such a bond would be required, had previously arranged for Defendants MARTENS and DENNIS to participate in this conspiracy by signing as sureties on the injunction bond required by law. MARTENS and DENNIS, being aware of the unlawful purpose of the conspiracy and of the roles played by MANGES and CARRILLO therein, did in fact sign such injunction bonds as sureties thereto, which actions in concert with MANGES, CARRILLO, and DCRC, did aid such conspiracy and damage Plaintiffs as hereinafter alleged.

Thus it was alleged that Martens and Dennis participated in the conspiracy, knowing its unlawful purpose as well as the roles of Manges and Carrillo, by performing a specific act to forward the conspiracy. Certainly, in the absence of any motion for more definite statement, this was adequate.

similarly certify the private party defendants as appellees. There is no question that all knew they were before the court. The issue as stated by appellants was certainly broad enough to cover immunity or want of it in the private parties.[4] And while we agree with appellees that the overwhelming emphasis in the arguments to the panel was on the immunity *vel non* of Judge Carrillo, the brief of Mr. Dennis, the private appellee whose brief was adopted by all others, does assert, albeit perfunctorily, their own immunity deriving from that of Carrillo. Finally, when we took the case en banc on rehearing of the panel's opinion and judgment, there can be no doubt that the appeal remained pending before the court, and we directed all parties' attention to this aspect of the broad issue before us.[5]

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[4] Appellants' brief reads:

> Does the doctrine of judicial immunity render a Complaint subject to dismissal for failure to state a claim upon which relief can be granted when the Complaint alleges a violation of civil rights under 42 U.S.C. §1983 by a state judge and others acting in concert with him and contains specific, factual allegations of an extra-judicial agreement between the judge and his co-conspirators that the judge would abuse his judicial office for the pecuniary benefit of his co-conspirators and further contains specific allegations of the subsequent abuse of judicial office in furtherance of the conspiracy.

[5] The letter of our clerk, Mr. Wadsworth, sent by our direction to counsel for all parties, reads in pertinent part:

> The issue with which the Court en banc is concerned is that reflected in the holding that:
>
> > Since Carrillo is immune, the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid §1983 claim can be stated. Thus,
>
> *(continued)*

[4, 5] Finally, it is asserted that the court somehow lost jurisdiction to hear the cause en banc when no motions for rehearing were filed to the panel and the 21-day period specified for issuance of the mandate by Rule 41, Federal Rules of Appellate Procedure, passed. Even cast in its worst light, that the court lay under a duty imposed by the "shall" language of Rule 41 to issue mandate within that time span, we do not think a failure to perform that duty punctually would deprive the court of jurisdiction. The rule grants us power to shorten or enlarge the specified period by order. This we did by instructions to the clerk to withhold issuance of the mandate. There is no requirement in the rule that such an order be formal, written, or that the parties be given notice of it, though this might be desirable. And even had there been no order, our jurisdiction would not have been affected, though it may be that in a proper case we might have been subject to a peremptory writ. Finally, our power to recall and reform a mandate even after issuance is, though not specifically provided for in the rules, well established, and no motion is required for us to hear or rehear a cause en banc. Rule 35(a), Fed. R. App. P.

Since we find that the issue of the derivative

(footnote continued from preceding page)

> the district court also properly dismissed the §1983 claims against the other defendants.

588 F.2d at 126 [headnote 2]. In other words, the Court wishes to reconsider the holding that Judge Carrillo's alleged co-conspirators—the private citizens—effectively share his immunity, since "they did not conspire with a person against whom a valid §1983 claim can be stated." *See Stump v. Sparkman*, 1978, 435 U.S. 349, 364 n.13, 98 S.Ct. 1099, 55 L.Ed.2d 331.

immunity of private persons who conspire with a judge is properly before us, we turn now to the substance of that matter. We begin our inquiry with a recognition that the absolute immunity that judges enjoy exists for the benefit of the judicial system and the public, not for that of the judge. Only a hero could exercise an unfettered judgment while facing, day after day and case after case, the prospect of personal ruin implicit in permitting every losing party to sue him for damages. There have never been enough heroes to go around, and a sound policy must deal with the prospect that some who occupy the bench may not be that ilk.

[6] In this imperfect world, however, where even the moon has a dark side, this manifestly necessary policy has the unfortunate effect of insulating not only the robe, but the person within it, from being called account for actions that may be illegal, even corrupt, as is alleged here. This undesirable side effect of an otherwise valuable prescription can, as to the magistrate himself, be safely mitigated only slightly. All authorities[6] recognize that when a judge acts in a "clear absence of all jurisdiction" he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend—even

[6] These range from *Bradley v. Fisher*, 13 Wall. 335, 351-52, 20 L.Ed. 646, 651 (1872), to *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). An even earlier formulation of the doctrine in *Randall v. Brigham*, 7 Wall. 523, 536, 19 L.Ed. 285, 291 (1869), that judges "are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, unless . . . the acts, in excess of jurisdiction, are done maliciously or corruptly," was pruned of qualifying language by *Bradley*.

successfully—against them. Thus the rule of judicial immunity from damages, with its single, bright-line exception, is as broad as, but no broader than, is necessary.

[7] Even so, the rule is a harsh one, laden with potential for unredressed wrong. As such, its scope should not be extended beyond that necessary to preserve the judge's independence of mind and judgment, for it is upon the manifest necessity to protect these, and on that alone, that the rule rests. When this is clearly seen, it becomes equally clear that no sound policy supports conferring any such immunity on private persons who persuade a judge to exercise his jurisdiction corruptly. Indeed, the thrust of wisdom is to the contrary. Sound policy suggests that attempts by such persons to subvert the judiciary should be penalized in every just way, civil as well as criminal. It suggests that the fullest redress that the judicial system can accommodate while functioning effectively should be granted for such odious wrongs. And it suggests that the actual incentive to corruption held out by the present doctrine, with its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes, should be removed.

[8] To be sure, the extension of derivative immunity to private persons alleged to have conspired with a judge eliminates one problem. Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by section 1983. Mischievous damage suits of this sort license the ill-disposed to require

judges to appear and testify. But the benefit that derivative immunity would accord in protecting judges from an obligation to testify in the trial of their alleged coconspirators, while not wholly illusory, is comparatively insignificant. There already exist many situations in which a judge is amenable to legal process and these have not proved ruinous to the functioning of the judicial system. For example, we have never held that judges are immune from claims for equitable relief, and both we and the Supreme Court have intimated the contrary. *See Wood v. Strickland*, 420 U.S. 308, 315 n.6, 95 S.Ct. 992, 997 n.6, 43 L.Ed.2d 214 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"); *United Steelworkers of America, AFL-CIO v. Bishop*, 598 F.2d 408, 413 (5th Cir. 1979) (leaving open possibility judge "may be the object of equitable relief in proper cases"); *United States v. McLeod*, 385 F.2d 734, 738 n.3 (5th Cir. 1967) (observing that *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), while holding "that judges are immune from liability for *damages* in suits under 42 U.S.C. §1983 ... does not ... mean that they may not be enjoined from pursuing a course of unlawful conduct"). Nor, of course, does immunity exist for judges under the criminal law or from normal civil process where a judge happens to be a witness to an incident giving rise to a lawsuit. And habeas proceedings sometime require the judge's testimony. We therefore doubt that the cause of keeping state judges off our witness stands and in their courtrooms with respect to conspiracy trials is critical to the effective functioning of the judicial system. Moreover, any good conferred by the incremental degree to which the

derivative immunity rule might protect state court judges from interruption of their courtroom duties by an obligation to testify seems greatly outweighed by the advantages gained by punishing those who subvert the judiciary, as discussed by us above.

So much, then, for policy, a matter entirely proper for our thorough exploration in view of the judge-made character of the doctrines under examination. We turn next to logical considerations, it being pressed upon us that a derivative immunity for judges' coconspirators follows ineluctably from established concepts, concepts both of state action and of general conspiracy law. As an analytical tool, let us posit the hardest hypothetical case, that of only two conspirators, one a private party and the other a state judge whose judicial order injuring federally protected rights constitutes the sole state action and the only overt act taken or needed to consummate these scheme. Both the conspiracy, since it takes two to conspire, and the section 1983 case, since it requires state action, therefore turn on the judge's involvement. How, as a matter of reason, can either be found to exist, it is asked, when the judge is immune from suit for the damages wrought?

The objection founded in conspiracy law, we conclude, is sustained by neither reason nor authority. Long ago, in a case involving one alleged to have conspired with foreign diplomats immune even to criminal indictment, we reasoned and held:

> The bill of Particulars furnished by the District Attorney admits that the Japanese persons named in the indictment were "the representatives, officers and agents of the Imperial Japanese Government." The motion to quash, which was overruled

on demurrer, states that one was a Commander in the Japanese navy, and the other registered in our Department of State as Assistant Naval Attache of the Japanese Government. We may assume it proven that they were such. It is thereupon argued that they have diplomatic immunity from prosecution, and could not be co-conspirators with Farnsworth so as to constitute a criminal conspiracy ... If such persons in the United States join with a citizen of the United States in a conspiracy to commit a crime, though it be conceded that the foreign diplomat would not be indicted in the District Court, or even that he could not be, his immunity will not excuse the local citizen. At least two persons must join in an unlawful enterprise to constitute it a conspiracy. The statute expressly so says. But both need not be prosecuted, or prosecutable. One may die, may escape, or obtain a pardon; but the other remains guilty. It may be that the offense of giving national defense information to a foreign government denounced by Section 32 could not well be committed by representatives of that government who receive it; but even so a person who cannot commit a substantive offense may guiltily conspire with another who can commit it that he do so. *United States v. Rabinowich,* 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211; *United States v. Holte,* 236 U.S. 140, 35 S.Ct. 271, 59 L.Ed. 504, L.R.A. 1915D, 281; *O'Leary v. United States,* 7 Cir., 56 F.2d 515; *Curtis v. United States,* 10 Cir., 67 F.2d 943. The rule that the acquittal of all save one alleged conspirators results in the acquittal of all applies to acquittals on the merits. The reason of it is that such judgments prove that there was in fact no criminal agreement among two or more persons. On the trial of a conspirator there is no technical rule that others must be concurrently or

precedently convicted. Nor will personal defenses of the other conspirators not amounting to a total incapacity to commit crime be a defense to him.

Farnsworth v. Zerbst, 98 F.2d 541, 544 (5th Cir. 1938). Unable to improve upon this reasoning or upon the language expressing it, we reaffirm it. Logically, Judge Carrillo's immunity from the damages remedy did not in any manner effect his capacity to conspire, as might have, say, an established condition of insanity. On what is presently before us, he was as able to enter into an agreement, legal or illegal, as any other adult citizen. The same is true of our hypothetical judge whom, since he is our creature, we endow with normal capacities. The objection sought to be grounded in conspiracy law does not bear analysis.

Nor do logic or authority support the objection that, since the sole "state actor" is immune from a damage suit, state action is somehow absent. Indeed, the proposition is so wide of the mark that merely to state it is to reveal its want of logic. In assaying for state action, the question is not at all whether the agent of the state who acts is subject to any particular sanction. Rather, it is whether he has exercised the power of the state in the premises. Both Judge Carrillo and our hypothetical magistrate entered orders deriving their force from state sovereignty. These were state actions, and their character as such is not impeached in any way by the circumstance that their authors could not be mulcted in damages because of them.

[9] The independence of the issue of state action from the pursuit of specific remedies against state officials is illustrated by *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

In that case, the plaintiff, Sandra Adickes, brought suit against *S. H. Kress & Co.* to recover damages under 42 U.S.C. §1983 for an alleged violation of her constitutional rights under the equal protection clause of the fourteenth amendment. One count of Ms. Adickes' complaint alleged that while serving as a volunteer teacher at a Freedom School for black children in Hattiesburg, Mississippi, she when with six of her students to the Kress store to eat lunch. According to the complaint, after the group sat down at a booth a policeman entered the store and "'observed [Ms. Adickes] in the company of the Negro students.'" 398 U.S. at 149, 90 S.Ct. at 1604. A waitress then took the orders of the Negro students but refused to serve Adickes because she was a white person "in the company of Negroes." *Id.* Following this refusal of service, Adickes and her students allegedly left the Kress store, and when they reached the sidewalk, the policeman who had previously observed her inside the lunchroom arrested Adickes on what she asserted was groundless charge of vagrancy. 398 U.S. at 149, 90 S.Ct. 1598. Adickes brought suit only against Kress, a private party, and not against the state or its officials, charging in this count that a Kress employee and a Hattiesburg policeman "reached an understanding to deny [her] service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes." 398 U.S. at 152, 90 S.Ct. at 1605. The Court was plainly untroubled by the fact that "[t]he involvement of a state official in such a conspiracy plainly provid[ed] the state action essential ..." *Id.* But in addition, the Court, discussing the elements of a section 1983 conspiracy between public

officials and private persons, made clear that a party who was not an official of the state could be liable for damages under section 1983 by virtue of the fact that the private person himself acts under color of state law and fulfills the state action requirement of section 1983 actions so long as he is involved in a conspiracy with a state official. The Court declared that

> a private party involved in such a conspiracy, even though not an official of the State, can be liable under §1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. . . ."

398 U.S. at 152, 90 S.Ct. at 1605-1606, *quoting United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966) (citation omitted). By the same reasoning, coconspirators act under color of law and can be sued for damages in a section 1983 action when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme. It follows that the unavailability of damages as a remedy against either Judge Carrillo or our hypothetical judge has no effect on whether the judges' actions were those of the state such that their coconspirators, too, acted under color of state law when they involved the judge in their conspiracy. The state action requirement for a section 1983 suit is met, judicial immunity notwithstanding.

The doctrine of a derivative immunity for private persons who conspire with judges can thus be seen to lack foundation in either reason or authority. Accordingly, we abolish it and, to the extent that our cases

cited at note 2 above espoused it, we overrule them. We recognize that in doing so we cast away a tool for discouraging possible mischievous lawsuits that, by intention or effect, harass judges for performing their offices. But this tool, like a hot flatiron, is too awkward for service as a cautery and works too much damage to surrounding structures for the small benefit it confers.

Insofar as the judgment below dismissed the claims against Duval County Ranch Co., Inc. and Messrs. Manges, Dennis and Martens, it is reversed, and these claims are remanded for further proceedings. Insofar as it dismisses the claims for damages against Judge O. P. Carrillo, it must be affirmed.

AFFIRMED in part and in part REVERSED.

COLEMAN and AINSWORTH, Circuit Judges, with whom RONEY and HILL, Circuit Judges, join dissenting:

Judges Wisdom, Godbold, and Tjoflat decided this case correctly at the panel level, 588 F.2d 124, 5 Cir. That decision should not now be overturned by the en banc court.[1]

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[1] Nothing is to be gained by commenting at any great length on the highly strained manner by which our Court had taken this case under its *en banc* wing. The extended apologia at the outset of the majority opinion is comment enough. Suffice it to say, nobody appeared here for any state judge. The sword is now suspended over their heads in a case in which only some, but not all, *private* parties appeared by counsel. If a criminal defendant were to be given this kind of short shrift we undoubtedly would be shrieking that it was "fundamentally unfair"–devoid of the most elementary "due process."

This case ought to be remanded to the docket. Briefs and oral argument ought to be had on behalf of state judges and state prosecutors. *They are the real defendants in this case.*

The majority concedes, as it must, that judges are *absolutely* immune to civil damage suits for judicial acts done within their jurisdiction, *Bradley v. Fisher,* 1872, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646. The same absolute immunity applies to state prosecutors, *Imbler v. Pachtman,* 1976, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128.[2]

Bradley v. Fisher, supra, was a case, in overheated times, growing out of the unsuccessful prosecution of John H. Suratt for complicity in the murder of President Lincoln. We feel that the en banc majority has failed to give full recognition to the teachings of that case. It was there held:

> "[The Judge] cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, *without apprehension of personal consequences to himself* (emphasis added). Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."
> 80 U.S. at 347.

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[2] *See, also*, the extensive array of cases cited in the panel opinion, 588 F.2d at 126, footnote 2.

Since *Imbler* held that state prosecutors have the same absolute immunity as judges, the en banc majority necessarily includes them in the net now being devised for judges.

The High Court not only said that the judges are immune to suits for pecuniary damages. The Court said that a judge shall be free to act "without apprehension of personal consequences." Begin dragged through a civil suit among private individuals in which the judge's integrity is the indispensable jurisdictional issue cannot be anything but a personal consequence which the en banc majority now allows in contravention to *Bradley*.

Bradley went on to hold that the purity of judicial motives, even judicial corruption, cannot be the subject of judicial inquiry in a civil suit. It noted that:

> "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."
> 80 U.S. at 348.

Bradley was recently reaffirmed in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). It was argued in *Stump* that the judge should be denied immunity "because of the tragic consequences of [his] actions," 98 S.Ct. at 1108, but the Supreme Court reaffirmed that a judicial officer should be free of " 'apprehension of personal consequences to himself' " [citing *Bradley*], 98 S.Ct. at 1108.

We believe that judges may not be attacked collaterally in a damage suit among private parties where, as in a §1983 case, jurisdiction depends on the establish-

ment by a preponderance of the evidence that the judge acting within his jurisdiction nevertheless acted conspiratorily and corruptly.

There is no merit in the argument that in the case presently before us the judge is not a party defendant. The functions of his office and his performance therein are indispensably necessary to the continuation of the action. To say that he is not being sued is a pretense.

What the en banc Court is doing here is to abrogate state judicial or prosecutorial immunity if the plaintiffs allege a conspiracy under a §1983 cause of action.

Although they cannot be sued directly, this en banc opinion allows state judges and state prosecutors to be sued *indirectly*, seriously breaching absolute judicial immunity. We must dissent.

The destruction of many a massive dike began with a very small leak. Jurisprudentially, this is just such a case, and the newly announced doctrine has been reached without precedent to support it; indeed, the majority summarily overrules prior precedents–"*We can and we do*" (emphasis added). By this indirection the Court now plants a land mine under every state judge and prosecutor in this Circuit, to be detonated at the whim and caprice of any unhappy state court litigant. And it makes not difference, apparently, that such litigants in meritorious cases have available state remedies against the private defendants.

The majority asserts at p. 980, that this unprecedented step is mandated by the need to deal with "unredressed wrong," but that protestation cannot stand examination. There is not the slightest hint that *damage suit* redress was unavailable under Texas law

against the private defendants.[3]

The majority concedes at p. 980, that "[e]very trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge . . . acted in knowing concert to deny federal rights protected by §1983."

That is exactly the fatal defect in this majority decision, and it should have been recognized that that state prosecutors are also being shoved off the ledge.

In seeking, quite lamely we think, to minimize the impact of what is being done here, the majority opines that the obligation of a judge to testify in such cases "is comparatively insignificant," as if this were the only danger to which judges and prosecutors are now about to be subjected. But this is a very small portion of the iceberg.

If there is anything a judge ought to prize and that the public demands, it is his *judicial integrity*. It is commonly accepted that a judge must not only avoid evil but he must avoid even the appearance of it. Under

[3]The panel opinion pointed out, 588 F.2d at 125, that the Texas Court of Civil Appeals dissolved the allegedly corrupt injunction involved in this case; moreover, the judge who issued it has been removed from the bench. We would be surprised to learn that the jurisprudence of Texas is so deficient that the damages available under 42 U.S.C. §1983 are unavailable under Texas law against the private individuals guilty of the kind of conspiracy alleged here.

It has been said, however, that rights guaranteed by Texas law are "no good in Duval County". Conditions in *one county* in six states cannot possibly justify abrogation of the absolute immunity of hundreds of judges and prosecutors who have absolutely nothing to do with what goes on in Duval. Verily, the hair on the tail is now to be allowed to wag the dog.

this decision any state judge or any state prosecutor may have that integrity besmeared by any individual who has lost a case and who knows how to *charge* enough misconduct to withstand a motion to dismiss, however without merit the complaint may be.

The Supreme Court has consistently recognized the existence of an interest in reputation which cannot be infringed without the invocation of due process requirements. The Court articulated this principle most clearly in *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), by asserting that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 437, 91 S.Ct. at 510. The High Court reaffirmed this concept in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), requiring a hearing for students suspended from high school. The Court noted that the charges of misconduct upon which the suspensions were based "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575, 95 S.Ct. at 736. *See, also, Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Court in rejecting the claim for a due process hearing noted that this would be a "different case" if the State had made charges against the plaintiff which "might seriously damage his standing and associations in his community."

In *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), the Court recognized that an allegation that the plaintiff, a trainee policeman, had

attempted to commit suicide, if false, would place such a stigma upon the plaintiff's reputation that due process procedures would be required under the Fourteenth Amendment.

In suits such as that now allowed by the majority for the first time in the history of this Court, how can the judge or the prosecutor defend himself? He is not a party defendant, so he is not entitled to trial participation as a party litigant. He might arrange active participation by surrendering the cornerstone of his judicial independence in a motion to intervene as a defendant. if he goes to that extreme (which if consistently followed would greatly harm the judiciary as an institution) he most likely would have to employ counsel, presumably at his own expense, suffering the consequent pecuniary punishment, if nothing else.

If the judge or the prosecutor does not become a party defendant, how can he guarantee himself the right to testify in behalf of his vindication? Who will call him as a witness? Who will examine and cross-examine witnesses? Could he ask for jury instructions? Would he be allowed to make an argument to the jury? Must the judge stand helpless while the most vital need and the most precious possession of the judiciary is damaged, possibly destroyed, by *private parties* to a *private* damage suit *which could not have been brought directly against him*?

Does our jurisprudence contemplate that in those cases where a judge has absolute immunity to a suit for money damages he may nevertheless have his judicial character and reputation irreparably splotched by a verdict from six jurors in a suit to which he could not have been made a party? We do not think so.

Although the majority *attempts* it, are judges to be equated with agents of foreign powers? Are judges to be equated with policemen who have only qualified immunity?

Neither do we consider the necessity for a state judge or prosecutor to appear as a witness in a private suit for money damages to be as inconsequential as the majority appraises it. Cases have a way of being delayed for a long time, continued from time to time. The state judge or prosecutor may have an important case which demands speedy attention. At the beck and call of private litigants he is immobilized, or, at least, forced into delays which may hamper justice.

THIS OPINION VIOLATES FEDERAL PRINCIPLES

Although the considerations already stated should be enough to affirm the dismissal of this complaint, there is a far more serious reason for not invading the absolute judicial immunity of state judges and state prosecutors.

Regardless of how diligently we may try to avoid the issue, the cold fact is that this decision makes state judges and state prosecutors *personally* answerable in federal court to private litigants for their state judicial or prosecutorial acts.

Of course, the legal correctness of such judicial actions may be reviewed as to federal constitutional questions in a number of ways, but the point is that in those instances the *legal merits* of the action are being reviewed, a matter of no *personal* consequence to the judge or prosecutor as to how the case may ultimately turn out.

MAJORITY RATIONALE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

Not only is the en banc opinion of this court harmful to basic policies underlying judicial immunity and insensitive to the delicate balance between state and federal courts, it is also contrary to what has been the clear weight of authority in the Federal Courts of Appeals. With the exception of the First Circuit,[4] all Circuit Courst that have explicitly considered the question have concluded that a private defendant cannot be held liable under §1983 for conspiring with a state actor if the state actor himself is immune.[5]

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[4] *Slotnick v. Staviskey*, 1 Cir., 1977, 560 F.2d 31, *cert. denied*, 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978); *Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno*, 1 Cir., 1976, 547 F.2d 1.

[5] See, e.g., *Hazo v. Geltz*, 3 Cir. 1976, 537 F.2d 747; *Guedry v. Ford*, 5 Cir., 1970, 431 F.2d 660; *Kurz v. Michigan*, 6 Cir., 1977, 548 F.2d 172; *Hansen v. Ahlgrimm*, 7 Cir., 1975, 520 F.2d 768; *Haldane v. Chagnon*, 9 Cir., 1965, 345 F.2d 601.

The position of the Seventh Circuit is presently somewhat unclear, following the highly fractionated en banc opinion in *Sparkman v. McFarlin*, 7 Cir., 601 F.2d 261, 1979. The per curiam opinion in that case affirmed the district court's dismissal of a §1983 conspiracy against private defendants after the state actor (a judge) was held to be immune from suit. Four concurring opinions were filed along with the per curiam order. Two judges wrote that the question of whether a §1983 suit may be brought when the state actor is immune was not properly before the court. *Id.* (Pell, J., and Bauer, J., concurring). Three judges, on slightly divergent rationales, would allow §1983 suits even when the state actor is immune, provided the

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The cases enunciating this rule begin with the Ninth Circuit's oft-quoted decision in *Haldane v. Chagnon*, 9 Cir., 1965, 345 F.2d 601. In *Haldane*, plaintiff charged that two judges of the Superior Court of California, the bailiff of one of the judges, and two licensed attorneys were involved in a broad-based conspiracy to deny him various constitutional rights. The Ninth Circuit affirmed the lower court's order of dismissal against the judges and the bailiff on the ground of judicial immunity. It then affirmed the dismissal as to the attorneys with the following language:

> With the elimination of the defendant judges and bailiff from the case, claims against the defendant attorneys under the Civil Rights Act cannot be stated. The attorneys were not State officers, and they did not act *in conspiracy with a State officer against whom appellant could state a valid claim.* It follows that they did not, and could not, commit the alleged wrongful acts "under color of state law or authority"; hence, they are not subject to liability under the "Civil Rights Act." *Id.* at 604, 05. (Emphasis added).

The Ninth Circuit has adhered to this rule in the recent cases of *Sykes v. Department of Motor Vehicles,*

(footnote continued from preceding page)

plaintiff meets the burden of a particularized pleading requirement. *Id.* (Fairchild, C. J., concurring), (Sprecher, J., concurring) (Tone, J., concurring).

Two cases from the Second and Third Circuits contain language broad enough to negate the rule stated in the text; i.e., that a private actor cannot be held liable for conspiracy under §1983 if the state actor is immune. *Jennings v. Shuman*, 3 Cir., 1977, 567 F.2d 1213; *Fine v. New York*, 2 Cir., 1975, 529 F.2d 70. However, these cases, which state generally that a private citizen can be liable under §1983 if he conspires with a state offical, never explicitly considered the question of whether the private actor is liable when the state actor is immune from suit.

9 Cir., 1974, 497 F.2d 197; and *Briley v. California*, 9 Cir., 1977, 564 F.2d 849.[6]

In addition to the Ninth Circuit, the same rule has been adopted by the Third,[7] Sixth, and Seventh Circuits.[8] *See, e.g., Hazo v. Geltz*, 3 Cir., 1976, 537 F.2d 747; *Waits v. McGowan*, 3 Cir., 1975, 516 F.2d 203; *Kurz v. Michigan*, 6 Cir., 1977, 548 F.2d 172;

[6]Note that Judge Choy's opinion in *Briley* refers to the holding in *Haldane* as "dicta." 564 F.2d at 858 n.10. Classifying the *Haldane* rule as "dicta," however, is dubious at best. The holding that private parties cannot be liable under §1983 when the state actor is immune from suit was necessary to the Ninth Circuit's affirmation of the lower court's disposition in *Haldane* and that ruling is certainly not "dicta." *Haldane v. Chagnon*, 9 Cir., 1965, 345 F.2d 601.

[7]The recent case of *Jennings v. Shuman*, 3 Cir., 1977, 567 F.2d 1213, has been cited for the proposition that the Third Circuit has abandoned the majority rule. However, a careful reading of that case demonstrates that the court was not presented with the question of whether a private defendant can be held liable under §1983 when the state actor is immune from suit. *See Hazo v. Geltz*, 3 Cir., 1976, 537 F.2d 747; *Waits v. McGowan*, 3 Cir., 1975, 516 F.2d 203.

[8]As noted in footnote 5, the current position of the Seventh Circuit is somewhat uncertain due to the recent en banc opinion in *Sparkman v. McFarlin*, 7 Cir., 601, 1979. The per curiam opinion in that case affirmed the lower court's dismissal of §1983 conspiracy charges against the private defendants after the state was held immune from suit. Whether this result was reached based on the Seventh Circuit's earlier adoption of the majority rule, *Hansen v. Ahlgrimm*, 7 Cir., 1975, 520 F.2d 768; *French v. Corrigan*, 7 Cir., 1970, 432 F.2d 1211, or upon a new rule that the conspiracy was not alleged with sufficient particularity is difficult to ascertain. *See Sparkman v. McFarlin*, 7 Cir., 601 F.2d 261, 1979 (Fairchild, C. J., concurring), (Pell, J., concurring), (Sprecher, J., concurring), (Tone, J., concurring).

Hansen v. Ahlgrimm, 7 Cir., 1970, 432 F.2d 1211; *Brown v. Dunne*, 7 Cir., 1969, 409 F.2d 341. *See also Sparkman v. McFarlin*, 7 Cir., 601 F.2d 261, 1979.

In the Fifth Circuit, the above rule has been firmly established since the 1970 case of *Guedry v. Ford*, 5 Cir., 1970, 431 F.2d 660. After *Guedry*, the rule has been followed in *Slavin v. Curry*, 5 Cir., 1978, 574 F.2d 1256, modified on other grounds, 583 F.2d 779; *Perez v. Borchers*, 5 Cir., 1978, 567 F.2d 285; *Humble v. Foreman*, 5 Cir., 1977, 563 F.2d 780; and *Hill v. McClellan*, 5 Cir., 1974, 490 F.2d 859. A rule of law so firmly established should not be lightly overturned.

Detractors of the rule argue that, however, firmly established, there was never an adequate rationale to sustain it, and in any event it cannot withstand rigorous analysis. We refute such contentions.

The policy rationale supporting the rule should be self-evident to anyone familiar with the burgeoning number of § 1983 suits and aware of the impact of this phenomenon on our federal judicial system. Today's opinion alters dramatically the relationship between state and federal courts. Henceforth, anyone dissatisfied with the result of litigation in state court can allege a "conspiracy" sufficient to obtain federal court review of his claim.[9] As one court put it:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a

[9]As noted by the majority: "Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by section 1983." Majority opinion p. 980.

retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'

"This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties. If in circumstances such as this defendants may be made to answer for their determinations, not only would the independence of the judiciary be undermined, but a ready means would be at hand to paralyze the entire judicial system."

French v. Corrigan, 7 Cir., 1970, 432 F.2d 1211, 1213-14 (quoting *Morgan v. Sylvester,* D.C., 125 F. Supp. 380, *aff'd,* 2 Cir., 220 F.2d 758, *cert. den.,* 350 U.S. 867, 76 S.Ct. 112, 100 L.Ed. 768).

Judge Sprecher, in his concurring opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261 at 267, 1979, sets forth quite clearly the policy considerations supporting the rule now abandoned by this court:

> The first is that frivolous civil rights action should be discouraged. Second, the federal courts, under the guise of civil rights, should not monitor and furnish a remedy for each losing party in every state court proceeding, particularly when the state merely furnishes the forum, has no interest in the outcome, and the state judge does no more than preside over a case presented to him by performing discretionary acts, judicial functions and the normal duties of his office. Third, private

> persons who are victims of, or witnesses to, a crime should not be discouraged from reporting the crime or from following the advice of a prosecuting attorney as to whether to lodge a formal complaint against, or to appear as a witness against, the perpetrator. Similarly, in civil matters, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before embarking upon activities of ambiguous legality. This is particularly important since it can be presumed that if the action is unconstitutional the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. Fourth, permitting conspiracies to be claimed which include immune judges may expose a judge to the time-consuming effort and chilling effect of submission to discovery and the appearance as a witness. Finally, if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to costly attack for participating in the same activity as the judge.[10]

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[10]Judge Sprecher also lists policy considerations militating for the rule adopted en banc by a majority of this court:

> There are of course other policy arguments favoring recovery from private co-conspirators. If a judge should, for example, accept a bribe for performing a judicial act which deprives a person of constitutional rights or should reach an express understanding with another person to violate the constitutional rights of a third person, a remedy should exist against the briber or conspirator regardless of the judge's immunity. It would be illogical to dispense immunity to state actors and then extend that immunity to private persons conspiring with them, narrowing civil rights relief to direct state action only. Civil rights cases should be disposed of by case-to-case attention and not swept

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Today's majority opinion spends little time with such policy considerations. The opinion notes that "[m]ischievous damage suits of this sort license the ill-disposed to require judges to appear and testify," but concludes that any such burden will be "comparatively insignificant." Majority opinion at p. 980. Once having given this slight nod toward the policy problems inherent in its holding, the majority spends the rest of its time demonstrating that its decision is analytically palatable.

We doubt that the practical impact of this decision properly may be termed as "comparatively insignificant." Today's decision affords an opportunity for state prisoners possessing sufficient pen and ink to allege a conspiracy between a judge, a prosecutor, and "whatever other participants the pleader's fancy may light upon." Majority opinion at p. 980. If the petitioner can drum up sufficient allegations to withstand a motion to dismiss, he can now effectively hail a state judge or prosecutor before federal court in the course of suing "private" parties.

The history of cases in our own Circuit should be instructive as to the probable impact of the majority's

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away by broad *per se* immunity. If in any particular case competing policy considerations exist, the federal court should be able to balance all such considerations in reaching its result.

Sparkman v. McFarlin, 7 Cir., 601 F.2d 261 at 267, 1979.

Judge Sprecher, for his part, favored abolishing the immunity rule. In its place, he suggested a rule requiring particularized pleading of §1983 conspiracy claims. This solution, which seeks to avoid a barrage of conspiracy actions, creates difficulties of its own—the particularized pleading requirement runs contrary to the general federal philosophy of notice pleading.

decision on the flow of prisoner appeals to this court. Of the five cases in this Circuit cited earlier as applying the immunity rule, four were brought by incarcerated or indicted plaintiffs. *Slavin v. Curry*, 5 Cir., 1978, 754 F.2d 1256, modified on other grounds 583 F.2d 779; *Perez v. Borchers*, 5 Cir., 1978, 567 F.2d 285, *Humble v. Foreman*, 5 Cir., 1977, 563 F.2d 780; *Hill v. McClellan*, 5 Cir., 1974, 490 F.2d 859.

Apparently the majority is, in fact, aware of the potential its opinion has for opening the door to frivolous conspiracy claims. Somewhat off-handedly the opinion states that "mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss." Majority opinion at p. 978. Thus, the court may be imposing a strict pleading requirement upon §1983 conspiracy actions, in order to avoid a barrage of groundless claims. Indeed, at least one judge in the Seventh Circuit has suggested that abolishing the immunity rule and replacing it with a "particularized pleading" rule is the proper solution to the present quandry.[11]

A particularized pleading requirement, however, is at odds with a basic policy underlying federal civil procedure—notice pleading. See Rule 8, Federal Rules of Civil Procedure.

Furthermore, erecting a pleading barrier between the courtroom and ungrounded lawsuits is likely to be an unsatisfactory means of avoiding frivolous litigation, since persons disposed to bring such litigation would probably have little difficulty explicating their alleged

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[11] *Sparkman v. McFarlin*, 7 Cir., 601 F.2d 261, 1979 (Sprecher, J., concurring).

grievances with particularity.

The majority is seemingly unaware of the inroads it has made into the doctrine of judicial immunity, or of the impact its decision could have on the respective roles of state and federal courts. "All authorities," the majority states, "recognized that when a judge acts in a 'clear absence of all jurisdiction' he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend—even successfully—against them." Majority opinion at p. 980.

In our view it is unwise to encroach upon the robe's immunity. The court now abandons a rule of law that has served this and other Circuits well for over a decade, and replaces it with a formulation corrosive to the doctrine of judicial immunity, harmful to the proper functioning of our federal system, and fraught with the possibility of providing the means for frivolous litigation.

We suggest that this decision will not be the last word on this subject and we respectfully dissent.

Sidney A. SPARKS, R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, Plaintiffs-Appellants,

v.

DUVAL COUNTRY RANCH COMPANY, INC., et al., Defendants-Appellees.

No. 77-1249.

United States Court of Appeals, Fifth Circuit.

Jan. 17, 1979.

Rehearing En Banc Granted March 9, 1979.

Garland F. Smith, Weslaco, Tex., James A. Erick, Patrick G. Rehmet, Alice, Tex., for plaintiffs-appellants.

Frank R. Nye, Jr., Rio Grande, Tex., for Clarence Martens.

Finley L. Edmonds, Corpus Christi, Tex., for Dennis.

John L. Hill, Atty. Gen. of Tex., David M. Kendall, Austin, Tex., for Carrillo.

A. Raul Garcia, Alice, Tex., for Manges and Duval County Ranch.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

This case involves judicial immunity from liability under the Civil Rights Act of 1871, 42 U.S.C. §1983. For purposes of the motion to dismiss the complaint, we must assume that the judge in question accepted a bribe. Decisions of the Supreme Court and this Court require us to adhere to the doctrine of judicial immunity. Accordingly, we affirm the district court's dismissal of this action.

According to the complaint, the plaintiffs, trustees, operated oil and gas wells on land adjacent to property owned by the defendant Duval County Ranch Company, Inc. (DCRC), a corporation wholly owned by the defendant Clinton Manges. The complaint alleges that Manges entered into a conspiracy with the defendant O. P. Carrillo, who served as a judge of the 229 District Court of Duval County, Texas, from November 1970 to January 23, 1976, when he was removed from office by the Texas Senate.[1] Under the alleged conspiracy,

[1] The Supreme Court of Texas also removed Carrillo from the bench. *See Matter of Carrillo*, 1976 Tex., 542 S.W.2d 105. According to the most recent submission in this case by the Attorney General of Texas, Carrillo is presently incarcerated in a federal penitentiary on income tax charges.

Manges bestowed financial favors upon Carrillo, who in return would rule as Manges directed in cases before his court.

The complaint charges that, on August 15, 1972, Manges filed suit in Carrillo's court to enjoin the pliantiffs' oil production. Manges alleged that the plaintiffs' operations were polluting DCRC's land. According to the complaint, Manges's true motivation was to stop the plaintiffs' production and thereby cause their oil lease to be terminated under the nonproduction clause it contained. The complaint next asserts that, at Manges's direction, Carrillo entered an order on January 18, 1973, temporarily enjoining the plaintiffs' oil production. The defendenats Clarence Martens and Orville Dennis served as sureties for the injunction bond. That temporary injunction remained in effect until June 25, 1975, when the Texas Court of Civil Appeals dissolved it. *Winslow v. Duval County Ranch Company*, 1975, Tex. Civ. App., 519 S.W.2d 217. The complaint asserts that, because of the conspiracy between Manges and Carrillo, the plaintiffs lost over two years of oil production on the land in question. The complaint states a claim under 42 U.S.C. §1983 for the alleged conspiracy to deprive the plaintiffs of their oil production. The complaint also states a pendent state claim based on the alleged wrongful injunction.

The district court dismissed the complaint. It determined that judicial immunity barred suit against Carrillo and that, with the state judge eliminated as a defendant, there were no §1983 claims under color of state law against the remaining defendants.

[1] Because we are reviewing a dismissal for failure to state a claim upon which relief can be granted, we

must assume the existence of all facts pleaded in the complaint. The defendants argue that Carrillo's act in entering the temporary injunction is protected by judicial immunity even if it had been induced by a bribe from Manges. We must agree.

Over a century ago, the Supreme Court embedded judicial immunity into our jurisprudence. In *Bradley v. Fisher*, 1872, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646, the Court stated that it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." Therefore, the Court held that "judges of the courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 80 U.S. at 351. The Court drew a distinction between acts in excess of jurisdiction, which are protected by immunity, and acts in the clear absence of all jurisdiction, which are unprotected. The Court illustrated this distinction by stating that a probate judge with jurisdiction over only wills and the settlement of estates who tried a criminal case would be acting in clear absence of all jurisdiction, while a criminal court judge who convicted a defendant of a nonexistent crime would merely be acting in excess of jurisdiction. 80 U.S. at 351-52.

In *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288, the Court held that judicial immunity applied to suits under 42 U.S.C. §1983:

> This immunity applies even when the judge is accused of acting maliciously and corruptly . . . His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

386 U.S. at 554, 87 S.Ct. at 1218. The Court recently reaffirmed that a judge may be liable in a civil action only when his act was in a civil action only when his act was in the clear absence of all jurisdiction. *Stump v. Sparkman*, 1978, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331. *See also Imbler v. Pachtman*, 1976, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (prosecutorial immunity).[2]

[2, 3] Because it is clear that Carrillo had jurisdiction over the action filed by Manges against the plaintiffs, we must affirm the district court's determina-

[2]This Court has faithfully followed this line of cases by applying judicial immunity even when corrupt or otherwise intentionally wrongful judicial acts are alleged. *See Slavin v. Curry*, 5 Cir. 1978, 574 F.2d 1256; *Perez v. Borchers*, 5 Cir. 1978, 567 F.2d 285; *Humble v. Foreman*, 5 Cir. 1977, 563 F.2d 780; *Connor v. Pickett*, 5 Cir. 1977, 552 F.2d 585; *Keeton v. Guedry*, 5 Cir. 1976, 544 F.2d 199; *Ford v. Byrd*, 5 Cir. 1976, 544 F.2d 194; *Grundstrom v. Darnell*, 5 Cir. 1976, 531 F.2d 272; *Cheramie v. Tucker*, 5 Cir. 1974, 493 F.2d 586, *cert. denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107; *Hill v. McClellan*, 5 Cir. 1974, 490 F.2d 859; *Williams v. Sepe*, 5 Cir. 1973, 487 F.2d 913; *McAlester v. Brown*, 5 Cir. 1972, 469 F.2d 1280; *People of Mississippi ex rel. Giles v. Thomas*, 5 Cir. 1972, 464 F.2d 156; *Carter v. Duggan*, 5 Cir. 1972, 455 F.2d 1156; *Collins v. Moore*, 5 Cir. 1971, 441 F.2d 550; *Perkins v. United States Fidelity & Guaranty Co.*, 5 Cir. 1970, 433 F.2d 1303; *Guedry v. Ford*, 5 Cir. 1970, 431 F.2d 660; *Beard v. Stephens*, 5 Cir. 1967, 372 F.2d 685; *Carmack v. Gibson*, 5 Cir. 1966, 363 F.2d 862.

tion that Carrillo's act in entering the temporary injunction was cloaked with judicial immunity.[3] Since Carrillo is immune, the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid §1983 claim can be stated. Thus, the district court also properly dismissed the §1983 claim against the other defendants. *Slavin v. Curry*, 5 Cir. 1978, 574 F.2d 1256; *Perez v. Borchers*, 5 Cir. 1978, 567 F.2d 285; *Humble v. Foreman*, 5 Cir. 1977, 563 F.2d 780; *Hill v. McClellan*, 5 Cir. 1974, 490 F.2d 859; *Guedry v. Ford*, 5 Cir. 1970, 431 F.2d 660. With the federal claim dismissed, of course, the district court did not err in dismissing the pendent state claim.

AFFIRMED.

On Rehearing

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY,

[3]We are aware that several commentators have concluded that judges should be protected by only a qualified immunity. *See Pierson v. Ray*, 1967, 386 U.S. 547, 558-67 & n.6 87 S.Ct. 1213, 18 L.Ed.2d 288 (Douglas, J., dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 N.W.U.L.Rev. 615 (1970); Note, *Immunity of Federal and State Judges from Civil Suit–Time for a Qualified Immunity?*, 27 Case W. Res.L.Rev. 727 (1977); Comment, *Charity Begins at Home: Judicial Immunity in Iowa*, 58 Iowa L.Rev. 197 (1972); Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322 (1969). *See also* Brazier, *Judicial Immunity and the Independence of the Judiciary*, 1976 Pub.Law 397; Judge, Schirott & Bliss, *Judicial Immunity Under the Civil Rights Act: Here Come the Judge's Defenses*, 7 John Marshall J. Prac. & Proc. 213 (1974); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 3 Rutgers-Camden L.J. 65, 69-82 (1976).

GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheared by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

SIDNEY A. SPARKS, ET AL.

v.

DUVAL COUNTY RANCH COMPANY, ET AL.

C.A. No. 76-C-2

O R D E R

Plaintiffs brought this suit pursuant to 42 U.S.C. §1983, alleging damages as a result of Defendant O. P. Carrillo's entry of an injunctive order against Plaintiffs. Carrillo had been judge of the 229th District Court of Duval County, Texas, when he entered an order enjoining production of minerals from certain leases

owned by Plaintiffs. Plaintiffs joined all other Defendants as co-conspirators in the alleged plan to deprive Plaintiffs of their civil rights.

Defendant Carrillo has moved for dismissal of this action, asserting the doctrine of judicial immunity as basis for his motion. All other Defendants assert Carrillo's immunity and urge that, because of such immunity, no state action claim can be asserted.

The doctrine of judicial immunity is deeply engrained in our jurisprudence. Generally, immunity extends to those judicial acts done within the judge's jurisdiction. *Pierson v. Ray*, 386 U.S. 547 (1966). Civil rights suits are also subject to a claim of judicial immunity. *Pierson, supra*, at 554. In *Hill v. McClellan*, 480 F.2d 859 (5th Cir. 1974), the Fifth Circuit stated that judges are immune if "acting within their jurisdiction and authority." *Hill, supra*, at 860. It is clear that Carrillo's action of entering an injunction was a judicial act within his authority, and the land in question was within his jurisdiction.

Even if an order is entered "maliciously or corruptly," judicial immunity applies, *Cadena v. Peraso*, 498 F.2d 383 (9th Circuit, 1974). A footnote in the Supreme Court's decision in *Pierson, supra*, stated: "Petitioner attempted to suggest a 'conspiracy' between Judge Spencer and the police officers by questioning him about his reasons for finding Petitioner guilty.... The proof of conspiracy never went beyond this suggestion that inferences could be drawn from ... judicial decisions." *Pierson, supra*, at note 8, pp. 553-54. Plaintiffs contend that a conspiracy did exist in their case. The Fifth Circuit has recently dealt with the question of judicial immunity in a conspiracy charge,

and has rejected the suggestion of *Pierson* that an alleged judicial conspiracy could remove immunity. In *Smart v. Jones*, 530 F.2d 64 (5th Cir. 1976), the Court held that immunity applied even where a conspiracy was alleged, and dismissed the charges. This Court therefore concludes that Defendant Carrillo is immune from liability in this action and his motion to dismiss must be granted.

The removal of Defendant Carrillo from this case effectively destroys a claim founded on 42 U.S.C. §1983. In *Haldane v. Chagnow*, 345 F.2d 600 (9th Cir. 1965), a conspiracy involving a judge was alleged in a §1983 suit. That Court found that the defendant judges enjoyed immunity from suit. The Court held that "with the elimination of the defendant judges and bailiff from the case, claims against [the other defendants] under the Civil Rights Act" could not be stated.

> "The [other defendants] were not State officers and they did not act in conspiracy with a state officer against whom appellant could state a valid claim. It follows that they did not and could not commit the alleged wrongful acts 'under color of state law or authority.'" *Haldane, supra*, at 604.

Therefore, the claims against the remaining Defendants must also be dismissed for failure to state a claim upon which relief can be granted.

The motions of Defendants Duval County Ranch Company, Inc., Clinton Manges, Clarence Martens, Orville E. Dennis, and O. P. Carrillo to dismiss are hereby granted.

IT IS SO ORDERED.

SIGNED this 17th day of December, 1976.

/s/
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHER DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

SIDNEY A. SPARKS, ET AL.

v.

DUVAL COUNTY RANCH COMPANY, ET AL.

C.A. NO. 76-C-2

JUDGMENT

For the reasons stated in this Court's memorandum and order entered on December 17, 1976, this case is hereby dismissed.

IT IS SO ORDERED.

SIGNED this 20th day of December, 1976.

/s/
UNITED STATES DISTRICT JUDGE

42 USC, Section 1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. §1979.)

Texas Constitution, Article XVI, Section 41.

§41. Bribery and acceptance of bribes

Sec. 41. Any person who shall, directly or indirectly, offer, give, or promise, any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the Legislature to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law. And any member of the Legislature or executive or judicial officer who shall solicit, demand or receive, or consent to receive, directly or indirectly, for himself, or for another, from any company, corporation or person, any money, appointment, employment, testimonial, reward, thing of value or employment, or of personal advantage or promise thereof, for his vote or official influence, or for withholding the same, or with any understanding, expressed or implied, that his vote or official action shall be in any way influenced thereby, or who shall solicit, demand and receive any such money or other advantage matter or thing aforesaid for another, as the consideration of his vote or official influence, in consideration of the payment or promise of such money, advantage, matter or thing to another, shall be held guilty of bribery, within the meaning of

the Constitution, and shall incur the disabilities provided for said offenses, with a forteiture of the office they may hold, and such other additional punishment as is or shall be provided by law.

U.S. Constitution, Article II, Section 4.

Section 4. Removal from office.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Texas Constitution, Article XV, Section 6.

§6. Judges of District Court; removal by Supreme Court

Sec. 6. Any judge of the District Courts of the State who is incompetent to discharge the duties of his office, or who shall be guilty of partiality, or oppression, or other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge; or who shall fail to execute in a reasonable measure the business in his courts, may be removed by the Supreme Court. The Supreme Court shall have original jurisdiction to hear and determine the causes aforesaid when presented in writing upon the oaths taken before some judge of a court of record of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court; said presentment to be founded either upon the

knowledge of the persons making it or upon the written oaths as to the facts of creditable witnesses. The Supreme Court may issue all needful process and prescribe all needful rules to give effect to this section. Causes of this kind shall have precedence and be tried as soon as practicable.

Texas Constitution, Article V, Section 11.

§11. Disqualification of judges; exchange of districts; holding court for other judges

Sec. 11. No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes. When a judge of the District Court is disqualified by any of the causes above stated, the parties may, by consent, appoint a proper person to try said case; or upon their failing to do so, a competent person may be appointed to try the same in the county where it is pending, in such manner as may be prescribed by law.

And the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law. This

disqualification of judges of inferior tribunals shall be remedied and vacancies in their offices filled as may be prescribed by law. As amended Aug. 11, 1891, proclamation Sept. 22, 1891.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
CORPUS CHRISTI, TEXAS

SIDNEY A. SPARKS, R. L. LYND, d/b/a/ SIDNEY A. SPARKS, TRUSTEE, Plaintiffs	)(	
VS.	)(	CIVIL ACTION NO. 76-C-2
DUVAL COUNTY RANCH COMPANY, INC., CLINTON MANGES, CLARENCE MARTENS, ORVILLE E. DENNIS AND O. P. CARRILLO, Defendants	)(	

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COME SIDNEY A. SPARKS and R. L. LYND, DOING BUSINESS AS SIDNEY A. SPARKS, Trustee, hereinafter called Plaintiffs, complaining of DUVAL COUNTY RANCH COMPANY, INC., hereinafter called DCRC; CLINTON MANGES, hereinafter called MANGES; CLARENCE MARTENS and ORVILLE E. DENNIS, hereinafter called MARTENS and DENNIS; and O. P. CARRILLO, hereinafter called CARRILLO, and would respectfully show unto this Honorable Court the following:

FIRST CAUSE OF ACTION

Jurisdiction

I.

This action arises under Section 1 of the *Civil Rights Act* of 1871, 17 Stat. 13, 42 USC 1983. The jurisdiction of this Court is grounded upon 28 USC 1343.

Venue

II.

Venue is proper in the Corpus Christi Division of the Southern District of Texas since the acts complained of occurred in such Division and since the Plaintiffs and all but one of the Defendants reside in such Division of such District.

III.

This is an action for damages brought pursuant to 42 USC 1983 for deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States, such deprivation having occurred under color of State law and by virtue of a conspiracy entered into and carried out by acts, in concert, of Defendant MANGES, acting by and through the DCRC, his solely owned corporation and alter ego, and Defendants CARRILLO, DENNIS and MARTENS.

This suit arises out of the well-known corruption which has, in the past, permeated every level of local government in Duval County, Texas, including the judiciary, of which Plaintiffs ask this Court to take judicial notice. In fact, Plaintiffs verily believe and allege that this case could not have arisen in any other County in the State of Texas where the ideal of "a government of laws and not men" is more closely observed, and it is primarily because of the corruption in office prevalent in Duval County that a federal forum is appropriate in this case. As will be more specifically pled hereafter, this case concerns efforts by Defendant MANGES to terminate a valid oil, gas and mineral lease owned and operated by these Plaintiffs, which effort was only a small part of a larger effort to terminate all oil, gas and mineral leases on land owned by DCRC. Because MANGES sought to accomplish this objective by bribery and official corruption, as will be more specifically pled hereafter, MANGES' actions acquired the character and authority of "state action", because carried out and effected under the color of law by his co-conspiritor, CARRILLO.

V.

Defendant MANGES, shortly after he acquired complete stock ownership of Defendant DCRC, found the land to be burdened with numerous oil, gas and mineral leases which MANGES was desirous of terminating so that he could either lease the same upon more favorable terms, or develop the minerals himself. MANGES determined to stop productin under such leases and thus cause such leases to be terminated under the provisions of the "non-production clause" common to most oil, gas and mineral leases in Texas.

VI.

To stop production under such leases, MANGES foresaw that he needed the help of a friendly Judge, one who would rule as MANGES wished him to rule. To that end, MANGES supported O. P. CARRILLO in his efforts to be elected Judge of the 229th District Court of Duval County, Texas. MANGES' support for CARRILLO, however, went further than the normal and usual political support for a candidate and, after CARRILLO had been elected, MANGES undertook to place CARRILLO heavily in his debt, and bestowed numerous gifts, favors, and things of value upon CARRILLO, some of which were as follows:

1. Carrillo was elected Judge of the 229th District Court of Duval County, Texas in November of 1970. On or about December 10, 1970, Defendant Manges, who had acquired controlling interest in the First State Bank & Trust Company, Rio Grande City, Texas, transferred to Carrillo qualifying shares of stock in said bank and made Carrillo a Director in the Bank, and in January ofeach year thereafter, during the pendency of the litigation involving the Plaintiffs herein, caused Judge Carrillo to be reelected to the Board of Directors. The bank, during this period, paid Directors fees in the sum of $50.00 per month to each Director.

2. Prior to December 31, 1972, Manges, as owner of controlling interest in said First State Bank & Trust Company, Rio Grande City, Texas, as aforesaid, caused a brother of Judge Carrillo, County Commissioner Ramiro Carrillo, to be elected or appointed to the Board of Directors of said bank, and annually thereafter caused Ramiro Carrillo to be reelected to the Board of Directors.

3. On January 27, 1971, Manges purchased a new Cadillac automobile from Riata Cadillac Company in San Antonio, Texas, for the sum of $6,915.55 and delivered or caused said automobile to be delivered to Carrillo, and Carrillo did accept said automobile.

4. During 1971, Defendant Manges permitted Defendant Carrillo to graze his (Carrillo's) cattle on about 1,000 acres of ranch lands Manges owned without charge. Carrillo accepted the lease and pastured his cattle thereon.

5. Defendant Manges, because of his ownership of controlling interest in the First State Bank & Trust Company of Rio Grande City, Texas, was in a position to cause said bank to make generous loans to Defendant Carrillo, and said bank did, during the years from 1971 through 1973, make numerous loans to Defendant Carrillo, one loan secured by real estate for over $300,000.00 and other unsecured loans totaling over $38,000.00.

6. At some time in the spring of 1971, Defendants Manges and Carrillo entered into an oral grazing lease for a term of three years granting to Judge Carrillo a grazing lease for his cattle on 5,000 to 6,000 acres of ranch lands in Starr County, Texas, with no payment down and with payment to be made at the end of the term in cattle or money, at Manges' option, and subject to cancellation by Manges at Manges' option. Defendant Carrillo accepted the lease and pastured his cattle thereon.

7. Because of the above listed transactions between Defendants Manges and Carrillo, the Honorable Magus F. Smith, Judge of the 93rd District Court of Hidalgo County, Texas, but sitting as Special Judge of the 229th District Court of Starr (also Duval and Jim Hogg) County, Texas, ruled on May 21, 1973 in Cause No. 3953 in said 229th District Court, styled *Clinton Manges vs. M. A. Guerra, et al,* that Defendant Judge O. P. Carrillo was disqualified as of February 1, 1971 to sit as Judge in that case wherein Defendant Manges was a party. A true copy of Judge Smith's remarks from pages 338 to 343 of the Record in said cause and the Order of May 21, 1973 are attached hereto for reference and made a part hereof for all purposes.

VII.

The intended and practical effect of MANGES' bestowing these gifts, favors, and things of value on CARRILLO and CARRILLO's acceptance of them, both at the inception of his term of office and while he was performing his duties as Judge, was to bribe Judge CARRILLO and such bribery continued throughout CARRILLO's term of office until he was impeached by the House of Representatives of the State of Texas and convicted and removed from office by the Texas Senate. MANGES and CARRILLO had made a bargain. In return for MANGES' continuing to bestow gifts, favors and things of value upon CARRILLO, CARRILLO, while sitting as Judge of the 229th District Court of Duval County, Texas, would rule as MANGES wished him to rule in cases before his Court in which MANGES was a party or was interested. MANGES' giving of gifts, favors and things of value to CARRILLO and the acceptance of such gifts, favors and things of value by CARRILLO and the understanding between them in consideration of which such transactions were entered into were all acts done in furtherance of the conspiracy here complained of, and, specifically, were acts done by CARRILLO in furtherance of such conspiracy which were not done in the exercise of his judicial jurisdiction.

VIII.

MANGES, having obtained complete stock ownership of DCRC, and having made the above arrangement with CARRILLO, then undertook action to terminate the oil, gas and mineral leases on property owned by DCRC and adjoining property. Plaintiffs herein are the owners, and

under the trade name of SIDNEY A. SPARKS, Trustee, the operators of a valid oil, gas and mineral lease on land owned by Exxon Corporation in Duval County, Texas, adjoining DCRC lands, such land being more specifically described as follows, to-wit:

> Eighty (80) acres out of Section 363, more particularly described as the West one-half (½) of the Southeast one-fourth (¼) of Section 363, J. Poitevent Original Grantee, Certificate 1/371, Duval County, Texas.

Plaintiffs were producing oil under the terms of this lease on or about August 15, 1972, when MANGES, through his solely owned corporation and alter ego, DCRC, filed suit in the 229th District Court of Duval County, Texas, to enjoin production on such lease and on other leases located on lands owned by DCRC. Unlike the other Defendants in that case, however, Plaintiffs in the instant case were producing oil from a lease on land adjoining DCRC lands, a fact which seemded to make little difference either to MANGES or to Defendant CARRILLO. In stating his cause of action in the 229th District Court, MANGES, through DCRC, claimed that the production activities of these operators were polluting DCRC ranch lands and, in a shotgun petition applicable to all Defendants alike, sought to enjoin all production under the terms of all such leases and also sought money damages. CARRILLO, in accordance with MANGES' petition, and pursuant to the agreement MANGES and CARRILLO had heretofore made, entered an order on January 18, 1973 temporarily enjoining production under Plaintiff's lease and such temporary injunction remained in effect until June 25, 1975 when it was dissolved by the Supreme Court of Texas. Furthermore, CARRILLO was not content to enjoin only pollution, although that was the principal basis of MANGES'

complaint, but framed the order so as to enjoin all production under such leases, although a more appropriate injunction could have been drawn.

IX.

CARRILLO, with respect at least to these Plaintiffs, was completely without jurisdiction to enter the order of January 18, 1973, enjoining production under Plaintiff's lease. In the first place, under Texas law, a Court is without jurisdiction to grant relief in an injunction proceding greater than that relief prayed for by the party seeking the injunction. In the case in the 229th District Court, DCRC had prayed for an injunction prohibiting production, "on property *which Plaintiff owns* in Duval or Webb County, Texas...". *Duval County Ranch Company, Inc. vs. The Speedman Oil Company, Inc., et al;* Cause No. 8591 in the 229th District Court of Duval County, Texas; Plaintiff's Second Amended Original Petition (Emphasis supplied). As pointed out above, the land on which Plaintiff's lease is located is not owned by DCRC, but is owned by Exxon Corporation. Thus CARRILLO's order enjoining production on this lease was completely void for want of jurisdiction.

In the second place, since these Plaintiffs operated a lease on lands adjacent to DCRC, Article 4644, Tex. Rev. Civ. Stat. Ann. (1940) applied and DCRC was required to allege in its Petition and prove that the party to be enjoined was unable to respond in damages before any injunction could lawfully issue. No such allegation was made and no such proof was offered; nonetheless, CARRILLO issued the injunction as prayed for by MANGES, although without legal authority to do so.

Thirdly, since CARRILLO had received the gifts, favors

and things of value mentioned above from MANGES, and since he was interested in the outcome of this litigation, as well as other litigation in which MANGES was a party or was interested, CARRILLO was absolutely disqualified to sit in this case, rendering any official action taken by him, other than ministerial acts, completely void and of no force and effect because CARRILLO, being disqualified, could not lawfully sit as Judge in this case.

X.

Defendant CARRILLO, in partiality to MANGES, and in furtherance of the conspiracy complained of, set the injunction bond required by temporary injunction at the ridiculously low figure of $5,000.00. MANGES, knowing that such a bond would be required, had previously arranged for Defendants MARTENS and DENNIS to participate in this conspiracy by signing as sureties on the injunction bond required by law. MARTENS and DENNIS, being aware of the unlawful purpose of the conspiracy and of the roles played by MANGES and CARRILLO therein, did in fact sign such injunction bond as sureties thereto, which actions in concert with MANGES, CARRILLO and DCRC did aid such conspiracy and damage Plaintiffs as hereinafter alleged.

XI.

The injunction was granted on January 18, 1973, as aforesaid, and Plaintiffs herein gave notice of appeal on that date. Such temporary injunction was dissolved by the Supreme Court of Texas on June 25, 1975, a total of 30 months later. That CARRILLO abused his discretion in the issuance of the temporary injunction has been conclusively

determined by the 9th Court of Civil Appeals and the Supreme Court of Texas. However, Judge CARRILLO's actions in this case amount to substantially more than a mere judicial error and demonstrate, in and of themselves, that Judge CARRILLO was acting in concert with MANGES to deprive Plaintiffs of their leasehold interests by unlawful acts carried on under color of State law. (See *Harry Winslow et al vs. Duval County Ranch Company, Inc.*, 519 SW2d 217 (Tex. Civ. App. 1975-writ ref., nre).

XII.

As a result of this conspiracy, and the unlawful acts complained of above, Plaintiffs would show that the recovery of 13,000 barrels of crude oil was lost as a result of the temporary injunction since other operators producing oil from the same reservoir were not similarly enjoined. The fair market price for production from stripper wells during the injunctive period was Thirteen and No/100 ($13.00) Dollars per barrel and, thus, Plaintiffs were damaged by the lost production in the amount of One Hundred Sixty Nine Thousand and No/100 ($169,000.00) Dollars, plus legal fees and expenses for defending against the suit in the amount of Fifteen Thousand and No/100 ($15,000.00) Dollars, for a total actual damages of One Hundred Eighty Four Thousand and No/100 ($184,000.00) Dollars.

XIII.

Plaintiffs would also show the Court that because of the fundamental nature of the wrongful acts committed by Defendants MANGES, CASRRILLO, DCRC, MARTENS and DENNIS, involving not only an interference with the legally protected property rights but also a complete denial of the basic right of all litigants to try their controversies in Courts presided over by fair and impartial Judges and the right of all citizens to be free from judicial oppression and harassment by Judges already committed to one side of the controversy because of bribery and corruption, that punative damages are appropriate in this case, and that the amount of punative damages for which Defendants MANGES, DCRC, CARRILLO, MARTENS and DENNIS are liable should be fixed at not less than double the amount of actual damages, plus such additional amount the Court may find necessary to cause these Defendants to discontinue such conduct, as well as to discourage others from so acting.

SECOND COUNT

I.

For second count, these Plaintiffs would join a State claim for damages against Defendants DCRC, MANGES, CARRILLO, MARTENS and DENNIS, and in connection therewith would reassert, with the exception of the jurisdictional statement contained in the First Count, the remaining allegations of Plaintiffs' First Count *in haec verba,* as though fully set out herein, and the allegations of the same are incorporated herein by reference for all purposes.

II.

This claim is joined with Plaintiffs' Federal claim under Rule 18 of the Federal Rules of Civil Procedure, and this

Court has jurisdiction of the same under its so-called "pendent jurisdiction" since the parties to the non-Federal claim are identical to the parties in the Federal claim and a common nucleus of operative fact is the basis for recovery in both.

III.

Plaintiffs would show unto the Court that Defendant MANGES, acting by and through DCRC, filed suit against Plaintiffs on August 15, 1972, seeking, among other things, to enjoin PLaintiffs from producing oil, gas, and other minerals under a mineral lease they held on the lands hereinbefore described, which such lands were adjacent to DCRC.

IV.

Plaintiffs further allege that a hearing was held and on January 5, 1973, Defendant CARRILLO, in abuse of his judicial discretion, enjoined these Plaintiffs from "pumping, flowing or producing any petroleum or oil from leases located in Duval County, Texas, from which the aforesaid Defendants have been producing petroleum and oil".

V.

On January 23, 1975, said injunction was dissolved by the 9th Court of Civil Appeals and in that case the Court of Civil Appeals held that the trial court abused its discretion by granting said writ of temporary injunction. Writ of error was refused by the Supreme Court of Texas on June 25, 1975 and Plaintiffs were at last free to resume production.

VI.

That by virtue of said writ of injunction production under said lease was suspended from January 18, 1973 until June 25, 1975, a total of 30 months, and that after said injunction was dissolved, an additional 2 months was required to get the wells back into production.

VII.

That during the 32 month period in which the three wells in question were not producing, the reservoir, from which the complainants had been producing prior to the injunction, was mined by other operators who did not come under the temporary injunction issued by the 229th District Court and the recovery of 13,000 barrels of crude oil was irreparably lost as a result of the temporary injunction. The fair market price for production from stripper wells during the injunction period was Thirteen and No/100 ($13.00) Dollars per barrel. Therefore, Plaintiffs were damaged by the lost production in the amount of One Hundred Sixty Nine Thousand and No/100 ($169,000.00) Dollars plus legal fees and expenses for defending against the suit in the amount of Fifteen Thousand and No/100 ($15,000.00) Dollars, or total actual damages in the amount of One Hundred Eighty Four Thousand and No/100 ($184,000.00) Dollars.

VIII.

That Plaintiffs' damages were the direct result of wrongful issuance of the injunction, as aforesaid, and Defendants MANGES, DCRC, and CARRILLO are therefore liable to Plaintiffs for the amount of actual damages suffered.

IX.

Additionally, Defendants MARTENS and DENNIS signed as sureties on the appeal bond of Defendant DCRC, and are therefore liable to Plaintiffs to the extent of their bond and should be ordered to pay said amount to the Claimants herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein, and that upon a final hearing hereof, these Plaintiffs have judgment for actual damages of One Hundred Eighty Four Thousand and No/100 ($184,000.00) Dollars, punative damages in the sum of Three Hundred Sixty Eight Thousand and No/100 ($368,000.00) Dollars plus such additional sums the Court may fix and that Plaintiffs do have and recover from MARTENS and DENNIS such amount as Defendants MANGES, DCRC and CARRILLO do not properly pay within the provision of said bond, and for costs of Court, and for such other and further relief, both in law and in equity, as Plaintiffs shall show themselves justly entitled.

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THE COURT: Gentlemen, do you wish to present any argument?

MR. SMITH: Your Honor, since that was presented under a bill, we will make no answer to it. I believe the matter, as far as we are concerned, has been adequately taken care of as far as proof. I think the evidence that has come in today has been irrelevant, and I don't believe has touched the matter of the disqualification of Judge Carrillo. I think the sort of thing they are thinking of, that possibly some people agreed to it, or submitted it, does not in any way affect the disqualification. The parties cannot by agreement make him qualified if he is disqualified. Otherwise, I believe our briefs are adequate.

MR. BATES: I have nothing, your Honor.

MR. CHURCH: I have no argument.

THE COURT: Well, gentlemen, it is kind of hard for a Judge to make this decision regarding a fellow Judge, but it is the opinion of the Court that Judge Carrillo is disqualified as of - - - well, say the first of February, 1971. I don't want my ruling in any way to prejudice the rights of any of the parties or reflect on anyone. But I feel that the promiscuous - - - Judge Carrillo, I think, has been honest. I don't think he feels he is disqualified or has done anything wrong. But the fact remains that he unquestionably - - - the negotiations with reference to the sale of the - - - or the transfer of the house and lot in Benavides, took place after - - - that is, it originally took place before he went in office, and was finally consummated after he was in office. Also, there was a lease on a number of acres of land, I don't know now how many acres — you might say a free lease for a short period of time, I don't remember how long, which would have amount to a gift. Then the lease on some five or six thousand acres of land at a price of $5,000.00 per year for three years, payable at the end of the term, and also for the right of Mr. Manges to terminate at any time he wished, would be a financial interest that would go with this case. It would be expensive for him to move his cattle. And he would have to pay up what was the lease at that time. Also, Mr. Manges is by far the greatest controlling stockholder of the bank, and the appointment as a director would have been a financial interest to him, even though small in comparison with the amounts involved in this law suit. And then the fact that Mr. - - - that the bank in which the litigant, Mr. Manges owned possibly three-quarters interest in it, by far the controlling interest, was making loans to him up to two or three hundred thousand dollars. As I recall, one of the notes, for two or three hundred thousand dollars, was

payable in one year, and the fact that the note could easily be demanded to be paid at maturity, or extended at the will of Mr. Manages. All of these things, and other matters, are like the sword of Damocles, hanging over the head of the Judge by a thin hair. I don't see how a person in that predicament could possibly render an impartial judgment. I couldn't. It's bad, but this is a matter that can be raised at any time. It could be raised after judgment, and it would have to be done all over again. It would be just wiped out. If you have another Judge hear it, he could go over this matter, and vindicate the decisions of Judge Carrillo, if that is correct, or render whatever judgment is correct. That is the reason I don't want in any manner to make any ruling that would in anywise be construed as either ratifying and confirming, or the opposite, holding that there was anything unjust. In my opinion, in other words, what I am saying is I am not accusing - - - no, that's not exactly the word — I don't mean to hold any of his decisions are not correct. I have no way of knowing that. The fact that they were correct or not correct, in my opinion, does not touch the question of disqualification. It goes to the root of our system itself. Our Courts are under pressure and subject to criticism on many things that are unjust. And our Courts are the very foundation of our system of society. And if our Courts become corrupt, then there is no justice in the land. And where there is no justice in the land, the only recourse is revolution and bloodshed, and then all people suffer. We, as Judges, must be like Caesar's wife, above and beyond reproach. It is hard enough to render justice and meet the criticism of people on decisions we are called on to make that are controversial, without the burden of anything else that can at all be questionable. I like Judge Carrillo. I have always thought a lot of him. He is young, and he is inexperienced on the bench, but he was kind of caught in a

web of circumstances that bound him in this particular case. So it will be the judgment of the Court that he is disqualified.

MR. BATES: Please the Court, on behalf of the Receiver, I ask the Court to make findings and conclusions of law, and give such notice as is necessary in open Court at this time, to appeal the judgment.

THE COURT: I don't know whether you can appeal it or not. I hope you can.

MR. BATES: Well, if we can't, we will try the mandamus route.

THE COURT: I hope you can. Either way I decide on this, the appellate Court can decide the opposite.

MR. BATES: Should I make a more formal request than I make now for findings and conclusions, or will that suffice.

THE COURT: I think that will be sufficient. All right, gentlemen, Court is adjourned.

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No. 3953

CLINTON MANGES, Plaintiff	)	IN THE DISTRICT COURT
VS	)	229th JUDICIAL DISTRICT
M. A. GUERRA, ET AL, Defendants	)	STARR COUNTY, TEXAS

ORDER ON MOTION FOR DISQUALIFICATION OF JUDGE

BE IT REMEMBERED that on the 15th day of January 1973, there came on to be heard before Honorable O. P. Carrillo, Judge of the 229th District Court of Starr County, Texas the motion of defendants, R. R. Guerra and M. A. Guerra that the Judge recuse or disqualify himself from sitting in this cause, and the said Judge O. P. Carrillo, after hearing testimony, evidence and arguments of counsel on said motion, on February 5, 1973 requested Honorable J. R. Alamia, Presiding Judge of the Fifth Judicial Administrative Judicial District to appoint another judge to hear and decide said motion; and the said Judge Alamia appointed the undersigned, Judge Magus F. Smith, Judge of the District Court of Hidalgo County, 93rd Judicial District to hear and decide said motion; whereupon, hearings were held thereon by the undersigned Judge on the 20th day of February, 1973, March 30, 1973 and April 23, 1973, at the conclusion of which hearing said movants R. R. Guerra and M. A. Guerra, rested, as did the Plaintiff, Clinton Manges, who opposed said motion. The Plaintiff, Clinton Manges was given until

May 7 to answer briefs filed by movants, and the movants were given until May 14 to file a rebuttal brief, after which the matter was submitted for decision. On May 11, 1973, the Receiver, James S Bates filed a motion to re-open the hearing for additional testimony, which motion was set down for hearing on Friday, May 18, 1973, and on such date the motion was heard and granted.

IT IS THE OPINION OF THE COURT, after considering all of the relevant evidence, the briefs and arguments of counsel, that the law and facts support the motion to disqualify; that the transactions between the Judge and the Plaintiff, Clinton Manges invoked the judge with a disqualifying interest in the case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Honorable O. P. Carrillo, Judge of the 229th District Court of Starr County, Texas is disqualified to sit as judge in the above styled and numbered cause as of February 1, 1971.

SIGNED AND ENTRED THIS the 21 day of May, 1973.

/s/Magus F. Smith
Judge Presiding

Harry WINSLOW et al., Appellants,

v.

DUVAL COUNTY RANCH COMPANY, INC., Appellee.

No. 7517.

Court of Civil Appeals of Texas, Beaumont.

Jan. 23, 1975.

Rehearing Denied Feb. 20, 1975.

Wood, Burney, Nesbitt & Ryan, Corpus Christi, Cox, Smith, Smith, Hale & Guenther, Morrison, Dittmar, Dahlgren & Kaine, San Antonio, Grose, Nixon & Erck, Alice, for appellants.

Stiernberg, Skaggs & Koppel, Harlingen, for appellee.

KEITH, Justice.

Several defendants have appealed from an order granting a temporary injunction which restrained each defendant from:

> ". . . pumping, flowing or producing any petroleum or oil from leases located on the following sections of land in Duval County, Texas from which the aforesaid Defendants have been producing petroleum and oil, to-wit: [here follows the name of each individual defendant and the particular section applicable to his operations]."[1]

Before these defendants, our appellants, were made parties to the suit, plaintiff below had obtained a temporary

[1]The order followed, precisely, the prayer for the temporary injunctive relief. See fn. 5, infra.

injunction against two other defendants who took an appeal to the Fourth Court of Civil Appeals at San Antonio. The basic pleadings involved in this case are identical to those summarized in the prior appeal now reported as Speedman Oil Co. v. Duval County Ranch Co., Inc., 504 S.W.2d 923, 925-926 (Tex.Civ.App.—San Antonio 1974, writ ref'd n. r. e.),. to which we refer. In our subsequent discussion we will refer to this as the "Speedman case."[2]

We will refer to Duval County Ranch Co., Inc., simply as plaintiff. The defendants will be grouped as their interests appear to be joint, namely: Winslow-Duval; Chiles-Arnold; Beissner; and Lynd-Sparks. Our record of a trial extending over a period of several months is extremely lengthy and, in our effort to condense the statement, many facets thereof may escape specific mention. In addition, several of the defendants urge similar points of error, in which event, one disposition will serve for all such overlapping contentions.

Background

Plaintiff was created in 1919 with approximately 144 000 acres of land situated mostly in Duval County. During the nineteen twenties, mineral rights were leased by "base leases." Defendants own, by unchallenged mesne conveyances, small tracts carved out of the base leases from the assignees of the original lessees.

Much of the plaintiff's land had been producing oil since

[2]Our record is much more complete than that considered in *Speedman*; consequently, we are able to reach and determine some issues which could not be determined there. For instance, with a complete record available, we entered an order the day after submission o the cause, increasing the amount of the injunction bond from $5,000 to $100,000.

the early nineteen thirties and most of the parties agree that the land had been overproduced by the nineteen forties when secondary operations began in an effort to recover the remaining oil in place.

Each defendant (except Lynd-Sparks and Chiles) was engaged in the production of oil from his own particular section of plaintiff's land by virtue of an assignment from the owner of one of the base mineral leases. In each instance, the particular defendant was a relative latecomer to the area, having acquired his assignment after oil had been produced therefrom for many years. It appears quite clear from the record that much of the equipment upon the respective leases was old and had likely reached the end of its productive life. Such equipment was, however, capable of producing oil and was actually being so used at the time of the commencement of the litigation.

There was no joint or concert of action between any of the several defendants: instead, each was operating completely independent of the other upon his own particular area of the vast ranch of the plaintiff, in some instances from five to twenty miles away from each other.

Although plaintiff's lands originally encompassed approximately 144,000 acres, by the terms of a comprehensive agreement executed in 1965, plaintiff and Humble Oil & Refining Co. (now Exxon Corp.) partioned the lands and minerals. It is sufficient to state at this point that plaintiff received the south 100,000 acres as its portion of the whole ranch with Humble receiving the north 44,000 acres. Each of the partitioning owners received numerous surveys which are described in our record as being "minerally classified." See Tex. Rev.Civ.Stat.Ann. art. 5368 (1962). We are not here concerned with the intricate details of the transaction between Humble and plaintiff.

After plaintiff's sole stockholder (Clinton Manges) obtained complete stock ownership of the plaintiff corporation, the present suit was instituted. Plaintiff's pleadings, very general in nature, were met with numerous special exceptions urged by the several defendants but all were overruled. We note, in passing, that no specific act or omission was charged against any particular defendant—the allegations being of a "shotgun" nature applicable to all alike.

After an extensive hearing over a period of several months, the trial court granted the temporary injunction sought by plaintiff, denied all relief sought by defendants, and refused to fix the amount of a supersedeas bond. Each defendant has filed his separate appeal and brief.

The appeal from the order granting the temporary injunction, dated January 18, *1973,* has been delayed because of the inability of the court reporter to prepare and file the statement of facts. It was not until June 14, *1974* that the record was completed.[3] Within six months thereafter, the parties had briefed and argued the case and it was ready for determination by December 12, 1974.

Opinion

"Plaintiff's suit seeks cancellation of [the] oil and gas lease[s] which [have] been assigned to defendants by the original lessee[s], and recovery of $2,000,000 actual

[3]Delay over such a protracted period frustrates the administration of justice and must be eliminated. This is particularly true when the appeal is from an order granting a temporary injunction—a 20-day appeal under Tex.Rev.Civ.Stat.Ann. art. 4662 (1952). See also, Modine Manufacturing Co. v. North East Independent School Dist., 489 S.W.2d 458 (Te.Civ.App.—San Antonio 1972, orig. proceedings).
(Tex.Civ.App.—San Antonio 1972, orig. proceedings).

damages and a like amount as exemplary damages because of alleged permanent injury to the surface of plaintiff's land as a result of defendants' operations."[4]

[1] The dominant purpose of plaintiff's suit was to secure a forfeiture of the oil and gas leases held by the defendants because of the alleged pollution of its lands, and to recover the damages caused to such lands.[5] The injunction which was granted was, consequently, an ancillary injunction. 6 Texas Practice (2d ed. 1973) §156, at 195; Houston Oil Co. of Texas v. Village Mills Co., 109 Tex. 169, 202 S.W. 725, 226 S.W. 1075 (1918); City of Dallas v. Wright, 120 Tex. 190, 36 S.W.2d 973 (1931); City of Beaumont v. West, 484 S.W.2d 789 (Tex.Civ.App.—Beaumont 1972, writ ref'd n.r.e.).

In our review of the order granting the temporary in-

[4]*Speedman Case,* supra (504 S.W.2d at 925). The remaining portion of the paragraph from which the above quotation is taken is likewise applicable to the case now under consideration.

[5]Plaintiff summarizes the thrust of its pleading in this manner: "The complaint [alleged in its petition] was in substance that Appellants [defendants] had allowed pollutants to escape from their production facilities into Appellee's [plaintiff's] pastures."

We quote the prayer of plaintiff's trial pleading: "Wherefore, premises considered, Plaintiff prays that the Defendants * * * be temporarily enjoined during the pendency of the main cause herein from pumping, flowing, or producing any petroleum, oil, gas, or any combination thereof from leases located on property which Plaintiff owns in Duval or Webb County, Texas, and that upon final trial hereof, all Defendants be permanently enjoined from so acting: that Plaintiff have judgment against all Defendants, jointly and severally [for its actual and exemplary damages] * * * that the Court further declare and determine that the leases under which Defendants claim be cancelled and terminated and that any and all rights to the said properties be declared forfeited and that the mineral estates formerly claimed by Defendants revert to Plaintiff; that Plaintiff recover its costs and have such other and further relief at law or in equity to which it may be justly entitled."

junction we are governed by a series of rules which have been stated, restated, affirmed, and reaffirmed by our Supreme Court upon several occasions. We do not find it necessary to again state the rules. See, e.g., Transport Co. of Texas v. Robertson Transports, 152 Tex. 551, 261 S.W.2d 549, 552 (1953); Camp v. Shannon, 162 Tex. 515, 348 S.W.2d 517, 519 (1961); Sun Oil Company v. Whitaker, 424 S.W.2d 216, 218 9Tex. 1968); Millwrights Loc. Union No. 2484 v. Rust Enginering Co., 433 S.W.2d 683, 686 (Tex. 1968). We are of the view that it would be to pile Pelion upon Ossa for us to attempt further elucidation of these rules.

[2] In its pleading for injunctive relief, plaintiff sought only a decree which unconditionally prohibited defendants from producing oil from the land covered by their valid leases [fn. 5, supra]; plaintiff did not seek to enjoin pollution. It is clearly established in this state that, before a court of equity may grant injunctive relief, the applicant must specify the precise relief sought and the court is without jurisdiction to grant relief beyond or in addition to that particularly specified.) Fletcher v. King, 75 S.W.2d 980, 982 (Tex.Civ.App.—Amarillo 1934, writ ref'd); Lone Star Gas Co. v. Childress, 187 S.W.2d 936, 939 (Tex.Civ.App.—Waco 1945, no writ); Davies v. Unauthorized Pr. Com. of St. Bar of Texas, 431 S.W.2d 590, 594 (Tex. Civ.App.—Tyler 1968, writ ref'd n. r. e.).

[3] We must bear another equally important rule in mind when we review the particular order under consideration. It was stated in Villalobos v. Holguin, 146 Tex. 474, 208 S.W.2d 871, 875 (1948), in this language: ("[T]he decree must not be so broad as to enjoin a defendant from activities which are lawful and a proper exercise of his rights.) 43 C.J.S., Injunctions, §211." See also, Scoggins v. Cameron County Water Imp. Dist. No. 15, 264 S.W.2d 169, 173

(Tex.Civ.App.—Austin 1954, writ ref'd).

[4] Another rule which we must honor is that stated in Sun Oil Company v. Whitaker, supra: "[I]n no event should the writ issue for the protection of an applicant who does not show a probable right on final trial to a permanent injunction." (424 S.W.2d at 218). See also, Millwrights Loc. Union No. 2484 v. Rust Engineering Co., supra.

We now face defendants' contention that the trial court abused its discretion in enjoining all *production* and not just *pollution.* Plaintiff, understandably, relies heavily upon the *Speedman Case,* supra. In their appeal, the *Speedman* defendants challenged the temporary injunction on the ground that "the interlocutory injunction alters, rather than preserves, the status quo." In stating the contention of the *Speedman* appellants, Justice Cardena used these words:

> "In presenting this ground for dissolution of the injunction, defendants maintain that the status quo to be preserved consists of the method in which they were operating prior to the institution of plaintiff's suit." (504 S.W.2d at 928)

In our case, defendants do not contend that they have a vested right to continue polluting the surface of plaintiff's lands. As one group of defendants [Chiles-Arnold] say:

> "Assuming, arguendo, that Appellants were 'polluting' the surface of the lands, the Appellants *do not* here contend that they have the right to commit wrongful pollution. *But they do contend that they have the vested legal right to continue to produce oil under their leases.*"(emphasis in text)

We now turn to a consideration of the correlative rights of the surface owner vis a vis those of the owners of the mineral estate. These rights were set out with admirable simplicity by Justice Steakley in Getty Oil Company v. Jones, 470

S.W.2d 618, 6212, 53 A.L.R.3d 1 (Tex.1971):

> "It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate." (citations omitted)

It is true, as pointed out by Justice Daniel in his dissent in Sun Oil Company v. Whitaker, 483 S.W.2d 808, 817 (Tex. 1972): "A definite trend toward conciliation of conflicts and accommodation of both estates is evident in our court decisions and in the conduct between the lessees and surface owners." Several well-reasoned opinions of our Supreme Court and the views of many legal scholars, cited by Justice Daniel, support the statement. See also D. Ferguson and I. Jones, II, "A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease," 13 S.Tex.L.J. 269, 289 (1971); Note, 50 Texas L.Rev. 806 (1972). However, no case cited to us (except *speedman,* supra) has sanctioned a complete prohibition of oil production from a valid lease because of an alleged conflict between the competing rights of the surface owner and the mineral lessee.

[5,6] Under the modern concept of the correlative rights of the surface owner and the mineral lessee, the rights of the latter to the use of the surface is not absolute or unfettered. Instead, the mineral lessee is limited "to uses which are reasonably necessary and which are made with due regard for the rights of the surface owner." Dissenging opinion in Sun Oil Company v. Whitaker, supra (483 S.W.2d at 821).[6]

[6]This was language first used by Chief Justice Calvert in the original opinion in *Whitaker,* supra, which was withdrawn upon motion for rehearing. 15 Tex.Sup.Ct.J. 60, 62 (Oct. 27, 1971).

Indeed, the author of the annotation reported in 53 A.L.R.2d 16,88 (1973), which is appended to Getty v. Jones, supra, cites many authorities supporting this statement:

> "The courts and the text and law review commentators have repeatedly stated that—whether or not expressly set forth—an oil and gas lease carries with it a right to reasonably necessry possession and use of the surface of the leasehold."

But, as was said in Humble Oil & Refining Company v. Williams, 420 S.W.2d 133, 134 (Tex.1967):

> "A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary."

See also, Amerada-Hess Corp. v. Iparrea, 495 S.W.2d 60, 61 (Tex.Civ.App.—El Paso 1973, writ ref'd n. r. e.).

The base leases under which defendants were producing are not of the more modern vintage. Rather, they are extremely broad. The defendant Arnold, for instance, holds under a base lease dated March 3, 1925, from plaintiff to Vacuum Oil Company, now Mobil. The lands were leased:

> ". . . for the sole and only purpose of operating for and producing oil, gas, casinghead gas, casinghead gasoline, coal, sulphur and all other minrals thereon and therefrom together with rights-of-way and easements for pipe lines, telephone and telegraph lines, tanks, power houses, stations, gasoline plants, treating plants and fuxtures for producing, mining, treating and caring for such products, and housing and boarding employees, and for the construction and maintenance of roads and any and all other rights and privileges necessary, incident to, or convenient

for the economical operation of said lease for oil, gas, casinghead gas, casinghead gasoline, coal, sulphur and other minerals with the right for such purposes to the free use of gas, oil and water produced on said land except water from wells or tanks of lessor. The easemrein granted hall apply to the land covered by this leased any other land owned by lessor in said Duval and Webb Counties, Texas."

Although the other bases leases under which other defendants were operating are not identical to that quoted, each base lease confers broad rights of use of the surface estate upon the lessees and assignees thereof.

[7] We accept one of the premises of plaintiff, based as it is upon the language found in Acker v. Guinn, 464 S.W.2d 348, 352 9Tex.1971): The mineral estate is dominant "and its owner is entitled to make reasonable use of the surface for the production of his minerals. It is not ordinarily contemplated, however, that the utility of the surface for agricultural or grazing purposes will be destroyed or substantially impaired." The lessee is liable in damages for permanent injury done to the surface of the land caused by his negligent acts. General Crude Oil Company v. Aiken, 162 Tex. 104, 344 S.W.3d 668 (1961); Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961); Texaco, Inc. v. Faris, 413 S.W.2d 147, 149 (Tex.Civ.app.—El Paso 1967, writ ref'd n. r. e.); W. Browder, "The Dominant Oil and Gas Estate—Master or Servant of the Servient Estate," 17 S.W.L.J. 25, 49 (1963).

But, plaintiff's damage suit is yet to be tried and is not before us in any form. It sought and obtained an injunction which prohibited production of oil—not prevention of pollution.[7]

[7]Plaintiff is mistaken when it says in its brief (p. 41): "The relief requested was the abatement of the continued pollution of Appellee's surface by these Appellants." See fn. 5, supra.

The Court's order enjoining further production from each defendant's lease was based, as noted above, upon general pleadings applicable to all alike. As might be expected, the testimony was not identical as to each of the defendant's activities. We need comment upon the activities of only two of the defendants to illustrate the divergence.

Defendant Winslow, readily admitting that the equipment on his leases was old, faulty, and in need of replacement when he acquired the leases, told of his efforts to improve the operating efficiency thereof.[8] Winslow had apparently made minimum efforts to upgrade the equipment before the filing of the application for a temporary injunction by plaintiff. Thereafter, he adopted a "wait and see" approach to the cleanup campaign.[9] Although he had only about $4500 available for such purpose, he insisted that his backers would furnish adequate funds to complete the operation.

Defendant Beissner, on the other hand, established by plaintiff's witness Robertson that the vegetation upon his leases was in the "[b]est shape I have ever seen it." *After* being served with plaintiff's application for an injunction, Beissner intensified his efforts in his extensive cleanup campaign. Inspector Crist of the Railroad Commission inspected the leases twice while the hearing was in progress, once in November and again in December. Crisp found no

[8]According to Railroad Commission Inspector Crisp, the leases acquired by Winslow "probably would not have been the worst in Duval County but they were one of the worst . . . he had done some work on his [leases] . . . but he still had a lot more work to do on that."

[9]Upon cross-examination Winslow testified:

"Well, we got started into all of these things [cleanup operation] and frankly we should pull [plug] some wells but I got to thinking about that and I thought well, I am a fool if I keep this up. I am sitting down here in this courthouse week after week and someone is trying to shut me in and I think if I was smart that I would wait and see what happens."

evidence of any violation of any Commission order or regulation on the Beissner leases. Further, from his inspections of the Beissner leases, he found that Beissner's "operations are the usual and customary way of operating in the oil field." No representative of plaintiff had ever complained to him of the conditions on the Beissner leases.

Frank S. Warner, a professional petroleum engineer, a consultant "of all phases of production and the sale of petroleum and gas," and an independent oil operator, testified to his inspection of the Beissner leases. It was Warner's opinion that Beissner's operation was a "very normal operation" and that his "use of the surface was reasonably necessary for the production of—and storage of oil and gas."

His three inspections, made during the course of the hearing on the application for the temporary injunction, found Beissner's equipment to be adequate and that the repairs had been made correctly. In short, although there may have been deficiencies in Beissner's operations when suit was filed, his production equipment and methods were conforming to the usual and customary operational standards at the time of the hearing.

[8] Thus, under broad conclusory allegations of a very general nature applicable to all defendants alike (when the proof showed a lack of concert of similarity of action),[10] the trial court enjoined *all* defendants in a common order prohibiting them from the further exercise of their lawful right to produce oil. This was done upon a record which did not support the broad order which was entered; upon a record which contained neither pleading nor proof of the lack

[10]"The petition must state all, and negative all, which is necessary to establish a right." Wilson v. Whitaker, 353 S.W.2d 945, 947 (Tex.Civ.App.—Houston 1962, no writ), and cases therein cited.

of an adequate remedy at law;[11] where where was no allegation of insolvency or proof of inability to respond in damages;[12] done without giving any consideration to the doctrine of clean hands,[13] laches,[14] balancing of equities,[15] or a showing that a less drastic injunctive order (i. e. one forbidding further pollution) was not adequate to protect plaintiff's alleged rights.

From the foregoing resume of the case, it is apparent that we are of the opinion that the trial court abused its discretion in enjoining the defendants from production of oil from the leased premises. The decree of the trial court enjoined the defendants from activities which were lawful and within a proper legal exercise of their rights—the production of oil. In granting the injunction, the trial court abused its discretion and violated the rules set out in Villalobos v. Holguin, supra (208 S.W.2d at 875), and Scoggins v. Cameron County Water Imp. Dist. No. 25, supra (264 S.W.2d at 173). In order that our action may be tested under the appropriate standards, we sustain the following points of error: Winslow-Duval, Point 10; Chiles-Arnold, Point 7; Beissner, Point 4; Lynd-Sparks, Point 5.

[11]Hill v. Brown, 237 S.W. 252, 255 (Tex. Comm'n App. 1922, jdgmt adopted); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615, 619 (1950).

[12]Hancock v. Bradshaw, 350 S.W.2d 955, 957 (Tex.Civ.App.—Amarillo 1961, no writ): "There is nothing in this record to show the parties responsible for appellee's damages, if any, are not able to respond in damages. The granting of an injunction in the face of an adequate remedy at law is an erroneous abuse of the court's discretionary powers."

[13]Omohundro v. Matthews, 161 Tex. 367, 341 S.W.2d 401, 410 (1960); Vaughan v. Kizer, 400 S.W.2d 586, 590 (Tex.Civ.App.—Waco 1966, writ ref'd n. r. e.).

[14]Culver v. Pickens, 142 Tex. 87, 176 S.W.2d 167, 170 (1943).

[15]Storey v. Central Hide & Rendering Co., supra, fn. 11.

While we have dissolved the temporary injunction in its entirety upon the basis of the present record before us, there is a *possibility* that plaintiff may seek another "temporary" injunction to prevent pollution of its surface estate. Therefore, we express our views upon several other facets of the matter which should be considered in such eventuality.

1A. *The Lynd-Sparks Lease*

According to the unchallenged statements in the brief of these defendants, their activities were confined to producing oil from well supon the J. Poitevent Survey, Section 363, in Duval County. According to the uncontradicted evidence (and plaintiff's admissions upon oral submission), this was on land which Humble owned with plaintiff having only a grazing lease thercon. Moreover, our record shows that Humble had filed a suit in ejectment in the Federal Court in Corpus Christi against plaintiff to force the removal of its cattle from this particular survey since plaintiff's lease thereon had expired before entry of the order granting the injunction.

[9] Since plaintiff has not denied the accuracy of the statements made by Lynd-Sparks in their brief, we are authorized to accept such statements as correct. Texas Rules of Civil Procedure, rule 419; Crawford v. Modos, 465 S.W.2d 220, 222 (Tex.Civ.App.—Beaumont 1971, writ dism'd). Having a tremendous record, we accept the said defendants' statements as being correct.

[10] Thus, plaintiff is merely an "adjacent land owner" as mentioned in Tex. Rev.Civ.Stat.Ann. art. 4644 (1940). In emphatic language, the cited statute forbids the issuance of an injunction prohibiting sub-surface drilling or mining operations on the application of an adjacent land owner

claiming injury to his surface or improvements unless the party alleged to be committing the wrongful act "is shown to be unable to respond in damages for such injury as may result from such drilling or mining operations."

As was said in Town of Refugio v. Strauch, 29 S.W.2d 1041, 1045 (Tex. Comm'n App. 1930): "The failure to allege the insolvency of the alleged wrongdoer raises the presumption that no such allegation could have been truthfully made, from which it is apparent that the defendants in error had an adequate remedy at law in a suit for damages." See also, Magnolia Petroleum Co. v. McClendon, 123 Tex. 10, 65 S.W.2d 484, 485 (1933).

Thus, we hold that "the issuance of the injunction in this case [against Lynd-Sparks] violates this provision of the law and regardless of the rights of the parties finally to be adjudicated, we hold that the writ was improvidently issued at the time it was, and under the conditions then existing." Town of Refugio v. Strauch, supra.

1b. *The Chiles Lease*

The above holding with respect to the Lynd-Sparks lease is also applicable to the "B" lease of Chiles, Section 204 of the J. Poitevent Survey in Duval County. This lease was on land owned by Humble which was not mineral classified land. Plaintiff's only interest was a grazing lease thereon which has subsequently expired.

2. *Amended Pleadings*

[11] As mentioned earlier, plaintiff's pleadings were very general in nature and did not charge any particular defendant with any specific act or omission upon any particular date.

While we have not passed directly upon defendants' challenges thereto—such action not being required under our view of the case—it is well to point out to the parties that pleadings in suits seeking injunctions are to be couched in clear language, definite and certain in meaning, and conclusions must not be relied upon. 6 Texas Practice (2d ed. 1973) §172, at 201. Plaintiff's reliance upon this court's opinion in McCamey v. Kinnear, 484 S.W.2d 150 (Tex.Civ.App.—Beaumont 1972, rit ref'd n. r. c.), is misplaced. *McCamey* was an ordinary civil suit with no injunctive relief being sought; and, moreover, it was a suit in which adequate time had elapsed for full discovery. In most injunction cases, time is of the essence and discovery is seldom available.

3. *Necessary Parties*

[12] In the posture in which this case reached us, we were not impressed with defendants' claim of non-joinder of necessary parties as a condition precedent to the issuance of the temporary injunction. In the ordinary case, such joinder is not required for, as stated in Littlejohn v. finder, 348 S.W.2d 237, 239 (Tex.Civ.App.—San Antonio 1961, no writ):

> "The matter of parties upon the trial of the merits will present a serious matter, but this proceeding concerns temporary orders. *One with rights which need preservation pending final trial, need not join all necessary parties before he can obtain interim orders.* If that were the rule, his rights might be lost before the parties could be found and joined." (emphasis supplied)

See also, Thomas v. Allis, 389 S.W.2d 109, 111 (Tex.Civ.App.—Tyler 1965, no writ).

But, these defendants have been "temporarily" enjoined for two years during which time, presumably, plaintiff has been searching diligently for the necessary and proper parties who must be joined before a final trial on the merits. See Cooper v. Texas Gulf Industries, Inc., 513 S.W.2d 200, 203 (Tex.1974), for a discussion of the rule with reference to joinder of parties.

4. *Inadequacy of the Temporary Injunction*

The words of the late Justice Norvell, in Southwest Weather Research, Inc. v. Jones, 160 Tex. 104, 327 S.W.2d 417, 421-422 (1959), express our view on the subject:

> "Deliberate action is essential for the accurate determination of legal rights and upon occasion this can be secured only by issuing a temporary decree protecting a status quo. Ordinarily, the hearing upon the temporary injunction is not a substitute for, nor does it serve the same purpose as the hearing on the merits. Generally the most expeditious way of obviating the hardship and discomforture of an unfavorable preliminary order is to try the case on its merits and thus secure a hearing wherein the case may be fully developed and the courts, both trial and appellate, may render judgments finally disposing of controversies."

See also, Briscoe Ranches, Inc. v. Eagle Pass Ind. Sch. Dist., 439 S.W.2d 118, 120 (Tex.Civ.App.—San Antonio 1969, writ ref'd n. r. e.). The observations in this section of the opinion apply with equal vigor to all parties to the suit.

5. *Other Points of Error*

We do not reach and consequently do not determine the merit, or lack thereof, of any other points in the several briefs.

6. *Conclusion*

The temporary injunction order by the trial court which prohibited the production of oil by the defendants from their several leases is set aside, vacated, and dissolved. All costs are taxed against the plaintiff.

Reversed and temporary injunction dissolved.

FILED
MAR 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1239

SIDNEY A. SPARKS AND R. L. LYND,
d/b/a SIDNEY A. SPARKS, TRUSTEE
Petitioners

v.

DUVAL COUNTY RANCH COMPANY, INC.,
CLINTON MANGES, ORVILLE DENNIS,
CLARENCE MARTENS, AND O. P. CARRILLO
Respondents

BRIEF OF RESPONDENT ORVILLE DENNIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners

v.

DUVAL COUNTY RANCH COMPANY, INC.,
CLINTON MANGES, ORVILLE DENNIS,
CLARENCE MARTENS, AND O. P. CARRILLO
Respondents

BRIEF OF RESPONDENT ORVILLE DENNIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Orville Dennis prays that the Petition of Sidney A. Sparks and R. L. Lynd d/b/a Sidney A. Sparks, Trustee, for Writ of Certiorari be refused. In support of that prayer, Respondent would respectfully show the folowing:

RESPONSE TO PETITIONERS' STATEMENT OF JURISDICTION

In their statement of jurisdiction, at page 2 of their Petition for Writ of Certiorari, Petitioners refer to a "timely motion for rehearing". The Court is advised that the only motion for rehearing filed with the Court of Appeals was filed by this Respondent. The "motion" was entitled "Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis". A true copy of the Court of Appeals' order denying this Respondent's Petition for Rehearing appears in the Appendix at page A1.

No motion or petition for rehearing was filed by the Petitioners as appellants in the Court of Appeals. The petition for rehearing filed by this Respondent did not question the Court of Appeals' holding which is the subject of Petitioners' Petition for Writ of Certiorari—that the state court judge is immune. Respondent questioned the other holding which concerns this Respondent—that Petitioners can maintain their claim for damages against this Respondent.

It is submitted that the statutory 90 days for filing a petition for writ of certiorari began to run for the Petitioners at least upon the entry by the Court of Appeals of the judgment on rehearing en banc on October 22, 1979. It is submitted that Respondent's petition for rehearing did not extend the filing time for Petitioners. To have been timely filed, Petitioners' Petition for Writ of Certiorari should have been filed with the Clerk of this Supreme Court on or before January 21, 1980. However, Petitioners' Petition was not filed with the Clerk of the Court until the following February 1, 1980. Moreover, no motion for extension of time was filed by Petitioners on or before January 21, 1980. It is, therefore, submitted that this Supreme Court does not have jurisdiction to consider Petitioners' Petition for Writ of Certiorari.

Subject to this Respondent's stated position that Petitioners' Petition was filed late, without waiving that position, Respondent would reply to other portions of Petitioners' Petition in the event this Court should disagree with Respondent's position on the untimeliness of the Petition for Writ of Certiorari.

RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Respondent submits that the first "question" stated by Petitioners at page 2 of their Petition is irrelevant to the subject case. The state court judge, O. P. Carrillo, one of the Respondents herein, was never adjudged disqualified to hear the state court lawsuit upon which is premised Petitioners' complaint under Title 42, United States Code, Section 1983. Petitioners' asserted number one question presented is simply not supported by the facts of the case, as will be demonstrated by Respondent in the remainder of this Brief.

Similarly, Petitioners' asserted number two question presented is not supported by the facts of the case. There has been no showing that the subject state court judge, O. P. Carrillo, entered the questioned temporary injunction in exchange for any "bribe". However, Petitioners did plead in their "Plaintiffs' First Amended Complaint" that Respondent O. P. Carrillo did receive over a period of years certain favors from Respondent Clinton Manges.

The relevant portion of the amended complaint appears in the Petition for Writ of Certiorari at pages 50a-51a.

Respondent suggests that the one question of law presented by the Petition for Writ of Certiorari is more accurately stated, as follows:

> "Whether the Court of Appeals was correct in hold- that O. P. Carrillo, a state court judge, was immune from Petitioners' claim for damages under Title 42, United States Code, Section 1983, under the doctrine of judicial immunity."

RESPONSE TO PETITIONERS' STATEMENT OF STATUTES INVOLVED

Petitioners assert at page 3 of their Petition that five state and federal constitutional and statutory provisions are involved in the Petition for Writ of Certiorari. To the contrary, only one of those provisions is involved, that being Title 42, United States Code, Section 1983 [Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13], which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In addition to the above-quoted federal statute, which will be referred to in the remainder of this brief as "Section 1983", Petitioners also propose that four constitutional provisions are involved, one from the United States Constitution and three from the Texas Constitution. First of all, Article 2, Section 4 of the United States Constitution is simply inapplicable to Texas and Texas state court judges. That provision, quoted at page 44a of the Petition, relates to removal from office of the president, vice-president and civil officers of the United States upon impeachment and conviction for treason, bribery, or other high crimes and misdemeanors.

With respect to the three provisions of the Texas Constitution cited by Petitioners, Article 16, Section 41, quoted in the Petition at pages 43a-44a, relates to the criminal offense of bribery committed by citizens and by members of the state legislature, state executives, and state judicial officers. That provision has nothing to do with disqualification of a judge to sit in a particular case, nor with a judge's liability for a civil suit for damages brought by a citizen of Texas.

Article 15, Section 6, of the Texas Constitution quoted in the Petition at pages 44a-45a, is the constitutional provision relating to removal of district court judges by the Supreme Court of Texas. It has nothing to do with the disqualification of a judge to sit in a particular case, nor with the liability of a judge for civil damages.

The third Texas constitutional provision, Article 5, Section 11, quoted in the Petition at pages 45a-46a, does set out the exclusive grounds for the disqualification of state district court judges, as well as members of other stated Texas courts. However, it has no relevance to a judge's liability for civil damages. That state constitutional provision was not asserted by the Petitioners in the subject

state court trial. This state law provision was first asserted by the Petitioners in their complaint filed in the instant case in federal district court seeking damages under Section 1983.

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

Petitioners misstate the subject case in their "Statement of the Case", which begins at page 3 of their Petition. They begin their "Statement" by describing another state court lawsuit. They finally make reference to the case before this Court (assuming existence of jurisdiction) in the second portion of their "Statement" at page 4 of their Petition.

In response, Respondent submits the following statement of the case. In the District Court below, the Petitioners alleged that a Texas state district court judge, O. P. Carrillo, a respondent herein, conspired with certain private individuals, Duval County Ranch Company, Clinton Manges, Clarence Martens and this Respondent, Orville E. Dennis, to deprive Petitioners of their civil rights. The complaint for damages was brought under Title 42, United States Code, Section 1983.

In the Petitioners' amended complaint, which appears in the Petition for Writ of Certiorari at page 47a, the alleged conspiracy is described as involving the conduct of Duval County Ranch Company in suing the Petitioners in state district court to wrongfully enjoin the Petitioners from certain activity on an oil and gas lease, the judge's subsequent entry of a temporary injunction, and Martens' and this Respondent's signing as individual sureties on the bond required under state law for issuance of the

temporary injunction. The temporary injunction was dissolved on appeal to a Texas appellate court. *Winslow v. Duval County Ranch Company*, 519 S.W.2d 217 (Tex. Civ. App. 1979—Beaumont, writ ref'd n.r.e.).

There was no motion made by the Petitioners in the state trial court raising the issue of the disqualification of the state judge to hear the case or enter the temporary injunction. There was no such determination by the Texas appellate court.

The only allegations contained in the Amended Complaint as to this Respondent are the conclusory allegations that this Respondent "knew" about a conspiracy among the judge, Manges and Duval County Ranch Company to unlawfully injure the Petitioners, and that this Respondent had participated in that conspiracy by signing a temporary injunction bond as individual surety.

The District Court below, on motions to dismiss submitted by this Respondent and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under Section 1983 (Memorandum Order appears in the Petition for Writ at page 39a).

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Petitioners would not have suffered the alleged injury.

Assuming the allegations of a conspiracy in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that

the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against this Respondent and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth Circuit, the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including this Respondent. In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to Section 1983 cases (Opinion appears in the Petition at page 33a).

With respect to the private citizen defendants, including this Respondent, the Court below held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed nor was any motion to stay issuance of the mandate filed. Then, on March

9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Respondent and the other parties of its intent to reconsider en banc only the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to a footnote, number 13, in a recent opinion of this Court, *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court of Appeals affirmed the panel's holding that the state court judge was immune from suit, but reversed as to the private alleged co-conspirators. The Opinion on rehearing en banc appears in the Petition at page 2a.

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite state action.

Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

This Respondent filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979. Upon this Respondent's

motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

On February 1, 1980, this Respondent filed his Petition for Writ of Certiorari which has been docketed by the Clerk of this Supreme Court as No. 79-1186, styled "Orville E. Dennis, Petitioner vs. Sidney Sparks and R. L. Lynd, d/b/a Sidney Sparks, Trustee, Respondents". In that Petition for Writ of Certiorari, this Respondent as Petitioner asserts that the decision of the Court of Appeals that allows the Petitioners in this case to maintain their complaint brought under Section 1983 against this Respondent, a private individual, is contrary to the public interest sought to be protected by the doctrine of judicial immunity as applied by this Supreme Court in Section 1983 cases. Further, this Respondent asserts in that Petition for Writ that the decision of the Court of Appeals allowing the Petitioners herein to maintain their suit under Section 1983 against this Respondent, as a private citizen co-conspirator, conflicts with the established rule followed by a majority of the courts of appeals, that this Supreme Court has not ruled on the specific issue, and that the conflict needs to be resolved by this Court because of the effect on the public policy behind the doctrine of judicial immunity.

In the first portion of their "Statement of the Case" Petitioners are referring to another state court lawsuit altogether removed from the state court lawsuit which is the basis for the case before this Court. That lawsuit was stayled "Clinton Manges, Plaintiff vs. M. A. Guerra, et al, Defendants", No. 3953, 229th Judicial District Court, Starr County, Texas. That case did not involve any of the Petitioners in this case, as conceded by Petitioners at page 4 of their Petition. It did involve one of the Respondents in this case, Clinton Manges. It involved different facts and different issues.

REASONS FOR REFUSING TO GRANT THE WRIT

Respondent submits that review on Writ of Certiorari should not be granted. The reasons for refusing to grant the Writ are many and they may be summarized as follows:

1. The Court of Appeals' decision to uphold and effectuate the doctrine of judicial immunity is consistent with the holdings of the United States Supreme Court and numerous Circuit Courts of Appeals.

2. It is a well established legal principle that the doctrine of judicial immunity applies even when a judge is accused of being corrupt or malicious.

3. It is uncontroverted that the judge in the present case acted within his state court jurisdiction.

4. There is no support in the record for Petitioners' argument that the state court judge was disqualified in the subject state court case. The argument is premised in state law and based upon another lawsuit unrelated to the subject lawsuit—another lawsuit involving other parties, issues and subject matter. Moreover, the argument runs contrary to well-settled Texas law.

5. Petitioners fail to correlate how any alleged bribery affected the state court judge's decision in the present case.

6. The Petition for Writ of Certiorari should be stricken for the reason that Petitioners filed their Petition too late.

ARGUMENT AND AUTHORITIES

I.

THE COURT OF APPEALS' DECISION TO UPHOLD AND EFFECTUATE THE DOCTRINE OF JUDICIAL IMMUNITY IS CONSISTENT WITH THE HOLDINGS OF THE UNITED STATES SUPREME COURT AND NUMEROUS CIRCUIT COURTS OF APPEALS.

The Fifth Circuit Court of Appeals' decision, in regard to its recognition of judicial immunity, is consistent with the decisions of the United States Supreme Court and numerous circuit courts of appeals decisions. The basic rule which has been followed is that judges are absolutely immune to civil damage suits for judicial acts done within their jurisdiction.

It was long ago recognized by this Court that it was in the public interest to protect judges from lawsuits brought complaining of their judicial decisions. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872). This landmark decision emphasized that the concept of judicial immunity is important to preserve our system of jurisprudence and it is imperative that judges be immune from prosecution for their acts as judges. This Court emphasized in *Bradley v. Fisher, supra,* that the doctrine of judicial immunity is based upon sound public policy:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to

> himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. . . .
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . ." *Bradley v. Fisher,* 80 U.S. at 347, 20 L.Ed. at 649-650.

Quoting from the case of *Floyd and Barker,* reported by Coke in 1608 (12 Coke 25), this Court in *Bradley* noted that if judges were subject to being questioned for their motives in their decisions as judges, such would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." *Bradley,* 80 U.S. at 348, 20 L.Ed. at 650.

Moreover, in this Court's landmark decision in *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), this Court reiterated and reaffirmed its recognition of the importance of the doctrine of judicial immunity. This Court stated:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on

judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray*, 386 U.S. at 554, 18 L.Ed.2d at 294-295.

Furthermore, this Court recently reaffirmed its recognition of the importance of judicial immunity in *Stump v. Sparkman*, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). Simply stated, this Court has consistently upheld the doctrine of judicial immunity and has given it effect in the cases involving the issue.

Numerous Circuit Courts of Appeals recognize the importance and applicability of the doctrine of judicial immunity. These Circuit Courts of Appeals emphasize that judges are absolutely immune to civil damage suits for judicial acts done within their jurisdiction. These courts recognize that no immunity doctrine is more strongly established than that of judicial immunity. *Waits v. McGowan*, 516 F.2d 203 (3rd Cir. 1975); *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970); *Perez v. Borchers*, 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109; *Kurz v. State of Michigan*, 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U. S. reh. den. 98 S.Ct. 1289; *Brown v. Dunne*, 400 F.2d 341 (7th Cir. 1969); *Hansen v. Ahlgrimm*, 520 F.2d 768 (7th Cir. 1975); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965); *Franklin v. Meredith*, 386 F.2d 958 (10th Cir. 1967). The Ninth Circuit Court of Appeals in *Gregory v. Thompson, supra*, appropriately described the judicial system's consistent recognition of the doctrine of judicial immunity when it said that the doctrine is "a seemingly impregnable fortress

in American jurisprudence. . . ." *Gregory v. Thompson*, 500 F.2d at 62.

Consequently, the recognition of the applicability of the doctrine of judicial immunity in the instant case by the Fifth Circuit Court of Appeals is consistent with the decisions of this Court and numerous other Circuit Courts of Appeals. It appears that the doctrine of judicial immunity is essential for the proper administration of justice and the consistent adherence to such a principle bears out its importance.

II.

IT IS A WELL ESTABLISHED LEGAL PRINCIPLE THAT THE DOCTRINE OF JUDICIAL IMMUNITY APPLIES EVEN WHEN A JUDGE IS ACCUSED OF BEING CORRUPT OR MALICIOUS.

Petitioners assert that the federal courts, including this Supreme Court, in propounding the doctrine of judicial immunity, have used broad language, and that any inclusion of a judge within the scope of judicial immunity when the judge was motivated by malice and corruption is merely dicta. Petitioners fail to substantiate their allegation with any authorities.

Contrary to Petitioners' unsubstantiated opinion, the scope of judicial immunity is intended to encompass judicial acts motivated by malice and corruption. In *Bradley v. Fisher, supra*, this Court explicitly stated that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall. at 351, 20 L.Ed. at 651.

In *Pierson v. Ray, supra,* this Court again explained that judicial immunity applies even if a judge is accused of acting corruptly. This Court said that:

> "This immunity applies even where the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 554, 18 L. Ed.2d at 294.

Moreover, in *Stump v. Sparkman, supra,* this Court clearly explained that a judge will not be deprived of immunity because the action he took was done maliciously. In discussing the inclusion of malice and corruption within the scope of judicial immunity, this Court stated in *Stump v. Sparkman* that:

> "Even earlier, in *Randall v. Brigham,* 7 Wall 523, 19 L.Ed. 285 (1869), the Court stated that judges are not responsible 'to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.' Id. at 537, 19 L.Ed. 285. In *Bradley* the Court reconsidered that earlier statement and concluded that 'the qualifying words used were not necessary to a correct statement of law. . . .' *Bradley v. Fisher,* 13 Wall 335, 351, 20 L.Ed. 646 (1872)." 55 L.Ed.2d at 338.

Simply stated, this Court has expressly stated that judicial immunity applies even when a judge has been accused of being corrupt or malicious. The Court has indicated that it is not dicta by specifically addressing the issue within several cases which have been before it.

III.

IT IS UNCONTROVERTED THAT THE JUDGE IN THE PRESENT CASE ACTED WITHIN HIS STATE COURT JURISDICTION.

It is uncontroverted that Judge Carrillo acted within his state court jurisdiction. A distinction should be made here between an act "in excess of jurisdiction" and an act "in clear absence of all jurisdiction."

Judges are immune from suit for judicial acts done within or "in excess of" their jurisdiction, even if those acts have been done maliciously or corruptly. *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974); *Lucarell v. McNair,* 453 F.2d 836, 838 (6th Cir. 1972); *Lynch v. Johnson,* 420 F.2d 818, 820 (6th Cir. 1970); *Agnew v. Moody,* 330 F.2d 868, 870 (9th Cir.), cert. denied, 379 U.S. 867 (1964).

It is only those instances in which a judge acts in the ". . . clear absence of all jurisdiction over the subject matter that he may be sued for damages." *Williams v. Sepe,* 487 F.2d 913 (5th Cir. 1973). *Jacobson v. Schaefer,* 441 F.2d 127 (7th Cir. 1971).

Consequently, an important element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into the act or acts of which Petitioners complain. In their First Amended Complaint, they assert that "the recovery of 13,000 barrels of crude oil

was lost as a result of the temporary injunction, since other operators producing oil from the same reservoir were not similarly enjoined." It is clear that Petitioners' complaints are directed toward the order signed by Judge Carrillo, temporarily enjoining production of oil from land leased in Duval County. Even if erroneous, Carrillo's act in entering this judgment was a judicial act. The order could not have been entered in any other capacity other than in Carrillo's judicial capacity.

In *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), the Texas appellate court, in reviewing Carrillo's actions in granting the temporary injunction, held that he "abused his discretion". 519 S.W.2d at 224. The Texas Court did not hold that Carrillo was without jurisdiction.

In order to exercise discretion, a judge would have to have jurisdiction over the parties and subject matter and be able to enter the order which he did. Therefore, Carrillo's act in entering the order granting the temporary injunction was not "in absence of all jurisdiction."

Importantly, this court should note that without such order or act (the injunction) Petitioners would not have sustained the "alleged" injury nor would there be anything of which to complain. Therefore, the injurious act complained of was a judicial act, clearly done in Judge Carrillo's judicial capacity and within the Judge's jurisdiction. His subject conduct thereby falls within the scope of judicial immunity.

IV.

THERE IS NO SUPPORT IN THE RECORD FOR PETITIONERS' ARGUMENT THAT THE STATE COURT JUDGE WAS DISQUALIFIED IN THE SUBJECT STATE COURT CASE. THE ARGUMENT IS PREMISED IN STATE LAW AND BASED UPON ANOTHER LAWSUIT UNRELATED TO THE SUBJECT LAWSUIT—ANOTHER LAWSUIT INVOLVING OTHER PARTIES, ISSUES AND SUBJECT MATTER. MOREOVER, THE ARGUMENT RUNS CONTRARY TO WELL-SETTLED TEXAS LAW.

In the first "question" stated on page 2 of their Petition, Petitioners include two unsupported assumptions. First, they assume that Judge Carrillo was adjudged disqualified to sit in the subject state court case. Second, they assume that what they call a "bribe" had a direct effect in the present case.

The only attempt by Petitioners to actually justify such assumptions was a reference to a wholly distinguishable state court case involving only some but not all of the same parties in this case. "Manges v. Guerra, et al", No. 3953, 229th District Court of Starr County. That case involved different parties, facts and legal issues and did not deal with the issue of Carrillo's disqualification to hear the case in which he entered the subject temporary injunction, which was styled "Duval County Ranch Company vs. Winslow, et al".

Any judgment in the state court case of "Manges v. Guerra, et al" is not *res judicata* as to this Respondent and the other parties in the instant case. Black's Law

Dictionary, 4th Ed. Rev. 1968 defines *res judicata* as the rule that:

> "final judgment or decree on merits by court of competent jurisdiction is conclusion of rights of parties of their privies in all later suits on points and matters determined in former suits. And to be applicable, requires identity in thing sued for as well as identity of cause of action, of persons and parties to action and of quality in persons for or against whom claim is made."

The case of "Manges v. Guerra" involved different parties, different rights, different facts, different legal issues and an altogether different cause of action. The Petitioners were not even parties to the "Manges v. Guerra" action. Simply stated, the reliance of Petitioners upon the unreported trial court order in "Manges v. Guerra" for disqualification of the judge in the state court case involved in the present case is faulty for the above stated reasons. Furthermore, Petitioners have misstated the order entered in that case.

Another state district judge, the Honorable Magus F. Smith, entered an order ruling only that Carrillo was disqualified to sit as judge in that particular styled and numbered cause. The judge did not order, as Petitioners have inaccurately stated, that Judge Carrillo was disqualified to sit in any case in which Manges was a party or was interested. That order appears in the Petition for Writ at pages 65a-66a.

There is no showing in the record before the Court that Judge Carrillo was disqualified from sitting in the subject injunctive suit. In fact, no such challenge was made by the Petitioners in the subject state court injunction suit. The issue was never raised. But they try to raise it now in this federal court litigation.

Outside of relying on distinguishable factual and legal occurrences, Petitioners have failed to meet their burden of proof in regard to justifying why Carrillo should have been disqualified in the subject state court suit. Moreover, their argument is premised on grounds which are contrary to well-settled Texas law.

Petitioners rely upon their reading of the Texas Constitution, Article 5, Section 11, which provision appears in the Petition at pages 45a-46a. Petitioners' basic argument is that the acceptance of a "bribe" should disqualify a judge. Under Texas law, there are certain criteria which must be proved and established before disqualification exists.

Article 5, Section 11, of the Texas Constitution stated that a judge may be disqualified if he is "interested" in the case, or where either of the parties may be connected with him, either by affinity or consanguinity or where a judge shall have been counsel in the case. That provision is both inclusive and exclusive. It specifies all the circumstances that forbid a judge to sit. See 33 Tex. Jur. 2d "Judges", Sec. 27 (1962) and cases there cited.

Petitioners fail to state which ground they are relying on for disqualification. Consequently, because there is no allegation that Carrillo was a previous counsel in the case or that the parties were connected by affinity or consanguinity, we will assume that Petitioners rely upon the "interest" factor for disqualification.

Texas law indicates that there is no compulsion to step aside when a judge is not legally disqualified. Unless

legally disqualified, it is the duty of the judge to preside. *Maxey v. Citizens National Bank of Lubbock*, 489 S.W. 2d 697 (Tex. Civ. App.—Amarillo, 1972), rev'd on other grounds, 507 S.W.2d 722 (1974).

It has long been established that the "interest" required for disqualification is one of a pecuniary nature. The possibility of pecuniary gain to the judge must arise directly out of the result of the suit, but not remotely. *Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. Sup. 1979); *Moody v. City of University Park*, 278 S.W.2d 912 (Tex. Civ. App.—Dallas 1955 ref'd n.r.e.); *Ex Parte Largent*, 162 S.W.2d 419 (Tex. Civ. App. 1942).

To prove disqualification, Petitioners have the burden of showing that Carrillo had a direct pecuniary interest in the result of the case, and not some interest that may occur or which is very remote. The only "proof" Petitioners provide is an allegation that Manges had made some gifts to Carrillo in the years prior to the subject state court lawsuit. However, Petitioners do not show a direct pecuniary interest in the case on behalf of Carrillo.

Simply stated, Petitioners have failed to meet their burden of proving disqualification.

V.

PETITIONERS FAIL TO CORRELATE HOW ANY ALLEGED BRIBERY AFFECTED THE JUDGE'S DECISION IN THE PRESENT CASE.

Petitioners state that bribery is an impeachable offense. However, Petitioners fail to specifically correlate how any

alleged bribery affected the Judge's decision in the present case. Petitioners fail to show how alleged bribery created any direct, real and certain interest on behalf of Carrillo in the subject matter of this case.

The Petitioners present an argument in their Petition more compelling than the facts support. Petitioners complain vociferously about the state court judge, Carrillo, entering the injunction because of a "bribe" from Manges. That assertion certainly sounds bad. But just what was the "bribe"? One must re-read the Petitioners' First Amended Complaint filed in the District Court to find a description of the so-called "bribe".

With reference to "Plaintiffs' First Amended Complaint", which appears in the Petition, beginning at page 47a, we refer specifically to Paragraph 6 of the amended complaint, appearing at pages 50a-51a of the Petition. What was the alleged "bribe" that caused Judge Carrillo to enter the injunction? As described in said portion of the amended complaint, the "bribe" consisted of Manges' support of Carrillo in his campaign for election as state district court judge. After Carrillo's election, the "bribe" consisted of several alleged gifts made by Manges to Carrillo over a period of three or four years.

The alleged post-election gifts consisted of Manges' issuance to Carrillo of enough bank stock to qualify Carrillo for his election to the Board of Directors of the First State Bank & Trust Company of Rio Grande City, Texas. The "bribe" included Carrillo's eligibility for a director's fee of $50.00 per month. Further, the "bribe" included Manges' causing Carrillo's brother, Ramiro Carrillo, to be elected to the Board of Directors of the same bank.

Carrillo was elected Judge of the 229th District Court of Duval County, Texas, in November of 1970. It is alleged that Carrillo became a director on or about December 10, 1970. It is alleged that his brother, Ramiro Carrillo, became a director prior to December 31, 1972.

The "bribe" includes the alleged gift from Manges to Judge Carrillo of a new automobile on January 27, 1971. Further, during 1971, Manges is alleged to have allowed Judge Carrillo to graze Carrillo's cattle on land owned by Manges without charge. In addition, during the same year, it is alleged that Manges and Carrillo entered into an oral grazing lease for a term of three years, which included no down payment, allowed Manges to cancel at any time, and called for payment at the end of the term either in cattle or money.

Furthermore, during the years of 1971 through 1973, the alleged "bribe" consisted of a bank loan from that bank to Carrillo for over $300,000.00, which loan was secured by Carrillo's real estate. The "bribe" consisted of other unsecured loans in the same bank totalling over $38,000.00.

So it does appear that the alleged "bribe" is really not one act, such as Manges handing money or other property to Judge Carrillo in connection with the subject state court lawsuit. Instead, the "bribe" which the Petitioners describe is an alleged continuing business relationship between Manges and Carrillo.

The foregoing clarification of the component parts of the alleged "bribe" is important here because of the Petitioners' allegation that acceptance of the "bribe" made Judge Carrillo disqualified from participating in the subject state court lawsuit under Texas law.

The argument sounds good, but it does not withstand scrutiny. Judge Carrillo would not be held to have been disqualified to enter the subject injunction if the issue had ever been litigated in a Texas court. As indicated previously, Article 5, Section 11, of the Texas Constitution has been interpreted by Texas courts to mean that a judge shall be disqualified in a particular case if he has a pecuniary interest in the outcome of the case, or if he is connected to the parties by affinity or consanguinity, or if he has been counsel in the case. Texas law indicates, however, that there is no compulsion to step aside where a judge is not disqualified by the above criteria. In fact, there is a compulsion to preside in the case.

Despite their conclusory allegations, Petitioners have not alleged facts which show that Carrillo entered the injunction in consideration for a "bribe". Quite clearly the "order" entered in the trial court in the "Guerra" suit did not retroactively disqualify Carrillo in the subject state court injunction suit.

VI.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE STRICKEN FOR THE REASON THAT PETITIONERS FILED THEIR PETITION TOO LATE.

The Petition for Writ of Certiorari should be refused because Petitioners appear to have filed it too late. The Petition complaining of Carrillo's immunity from suit perhaps should have been filed following the Fifth Circuit Court of Appeals' decision on January 17, 1979.

Rule 22(3) and Title 28, U.S.C., Section 2101 prescribe the time requirements for filing with the Supreme Court a petition for writ of certiorari to review judgments of lower federal courts. Title 28, U.S.C., Section 2101(c) states, "any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." In the present case, the Fifth Circuit Court of Appeals first entered judgment on the case in January 17, 1979. No petition for writ of certiorari was filed by Petitioners within ninety (90) days after such judgment, and no motion for extension of time was filed.

Did the grant of the rehearing en banc by the Court of Appeals, on its own motion, suspend the time for Petitioners' filing? We think not. The rehearing was granted to reconsider the holding regarding the derivative immunity of the private citizen co-conspirators. It was not granted to reconsider the issue of the judge's immunity.

The Fifth Circuit Court of Appeals specifically stated in its en banc decision that, "we consider this case en banc to review the holding of our panel that private citizens, in conspiring with a state judge, did not conspire with any person against whom a claim valid under 42 U.S.C. Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under the statute." *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976 (5th Cir. 1979). As for the issue of the state court judge's immunity, the Fifth Circuit reiterated that Carrillo was unqualifiedly immune from suit, as so held in the opinion rendered by the panel on January

17, 1979. 604 F.2d at 978. Consequently, the issues referred to in the Petition for Writ of Certiorari were not considered by the Fifth Circuit Court of Appeals on its reconsideration en banc.

However, if the effect of the reconsideration en banc by the Fifth Circuit Court of Appeals was to suspend the time for Petitioners' filing the subject petition, some authorities have indicated that where there is a second judgment a petition for writ of certiorari is timely if it was filed within ninety (90) days after the second judgment was entered. *Reece v. Georgia,* 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167 reh. den. 550 U.S. 943, 100 L.Ed. 822, 76 S.Ct. 297 (1955).

However, this Petition for Writ of Certiorari is still not timely because it was not filed within ninety (90) days after the en banc decision of October 22, 1979. Instead, it was filed on February 1, 1980. No petition for rehearing was filed by Petitioners with the court of appeals, which may have extended the time for filing the Petition.

The only petition for rehearing filed after entry of the judgment on October 22, 1979, was filed by this Respondent to complain about the holding on derivative immunity which is not involved in Petitioners' Petition for Writ. Respondent has not found any authority which permits the appellant in the court of appeals to rely on a petition for rehearing filed by the appellee to extend the time for filing the appellant's petition for rehearing. Moreover, no motion for extension of time was filed by Petitioners on or before the deadline, January 21, 1980. Consequently, the Petition for Writ of Certiorari is not timely and should be withdrawn.

SUMMARY

None of the challenges raised by Petitioners justify the exercise of this Court's writ jurisdiction. Petitioners do not justify the arguments they have developed.

This Court and numerous Circuit Courts of Appeals have upheld the doctrine of judicial immunity as was done in the en banc and panel decisions of the Fifth Circuit Court of Appeals in this case. This doctrine has been consistently held to apply even when a judge is accused of being corrupt or malicious. In the subject case the judge was within his state court jurisdiction in regard to the actions he took.

As to Petitioners' argument regarding disqualification of a judge, Petitioners fail to meet their burden of justifying such disqualification. They rest their hopes on an order entered in another case which involved different parties, facts and issues. Moreover, Petitioners have failed to timely file their Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, Respondent Orville Dennis respectfully submits that the Petition on behalf of Petitioners Sidney A. Sparks and R. L. Lynd d/b/a Sid-

ney A. Sparks, Trustee, for Writ of Certiorari, should be refused.

Respectfully submitted,

ORVILLE DENNIS, *Respondent*

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent Orville Dennis in opposition to Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P. O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, #5 Northwood, Del Mar Hills, Laredo, Texas; Mr. Raul Garcia, 208 N. Cameron, Alice, Texas 78332; and Hon. Mark White, Attorney General, P. O. Box 12548, Austin, Texas 78711, Attn: Ms. Laura Martin, Asst. Attorney General; on the _____ day of March, 1980.

FINLEY L. EDMONDS
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Corpus Christi, Texas 78403

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 77-1249

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs-Appellants,

versus

DUVAL COUNTY RANCH COMPANY,
INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

ON PETITION FOR REHEARING

(December 14, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

* Judges Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Sam D. Johnson, and Tate did not participate in the consideration of or decision in this case. The case was taken under submission by the Court en banc on June 5, 1979.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Orville E. Dennis in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS GIBBS GEE
United States Circuit Judge

Supreme Court, U. S.
FILED
MAR 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

No. 79-1239

SIDNEY A. SPARKS AND R. L. LYND,
D/B/A SIDNEY A. SPARKS, TRUSTEE
Petitioners

v.

DUVAL COUNTY RANCH COMPANY, INC.
CLINTON MANGES, ORVILLE DENNIS,
CLARENCE MARTENS, AND O. P. CARRILLO,
Respondents.

BRIEF OF RESPONDENT O. P. CARRILLO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK WHITE
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IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1980

No. 79-1239

SIDNEY A. SPARKS AND R. L. LYND,
D/B/A SIDNEY A. SPARKS, TRUSTEE
Petitioners

v.

DUVAL COUNTY RANCH COMPANY, INC.
CLINTON MANGES, ORVILLE DENNIS,
CLARENCE MARTENS, AND O. P. CARRILLO,
Respondents.

BRIEF OF RESPONDENT O. P. CARRILLO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent O. P. Carrillo respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Sidney A. Sparks and R. L. Lynd d/b/a Sidney A. Sparks, Trustee, seeking to review a portion of the opinion of the United States Court of Appeals for the Fifth Circuit. The original opinion rendered by a three-judge panel is reported at 588 F.2d 124. The opinion of the Fifth Circuit sitting en banc for which review is sought is reported at 604 F.2d 976.

JURISDICTION

The en banc decision, sought to be reviewed in this Court, was entered on October 22, 1979. Rehearing of that opinion was sought by Orville E. Dennis, a Respondent herein, whose Motion for Rehearing was overruled by the Court of Appeals on December 14, 1979. Apparently the Motion for Rehearing was timely filed.

Respondent Orville E. Dennis in his Brief in Opposition questions the Court's jurisdiction by apparently asserting that the Petitioner cannot take advantage of the filing of the Motion for Rehearing because it was not filed by Petitioner.

Respondent O.P. Carrillo does not adopt this position and believes Petitioners have adequately stated jurisdiction.

REASONS WHY THE WRIT SHOULD BE DENIED

Respondent O. P. Carrillo was at all pertinent times the District Judge for the 229th Judicial District of Duval County, Texas. The Complaint filed in the United States District Court, brought under 42 U.S.C. §1983, complained of Judge Carrillo's acts during a hearing in pendancy for a lawsuit filed in his state court.

Petitioners' assertion, that Judge Carrillo was disqualified from hearing the state lawsuit with the resulting implication that his judicial acts taken during the course of the lawsuit were not within the Court's jurisdiction, is completely erroneous.

The Court of Appeals for the Fifth Circuit was correct in its determination that Judge Carrillo was acting within his judicial capacity in the state proceeding and that he is, accordingly, immune from suit. *Stump v. Sparkman*, 435 U.S. 399, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872).

ADDENDUM AND CONCLUSION

Respondent O. P. Carrillo opposes the granting of this Petition for Writ of Certiorari which presents the sole question of whether the doctrine of judicial immunity should be pierced in certain cases where outrageous conduct is shown on the part of a state judge.

Additional petitions for Writ of Certiorari, however, have been filed by other parties involved in the decision below; each present the question of whether a private citizen can be held liable for damages under 42 U.S.C. §1983 when he is alleged to be a co-conspirator with a state court judge who is absolutely immune under the doctrine of judicial immunity. The court below found that a private citizen can be liable for damages in such a conspiracy, and this Respondent intends to file an Amicus Brief in support of those petitioners who are questioning that part of the circuit court's decision. The holding that a private citizen can be held liable in an alleged conspiracy with a state judge greatly weakens the doctrine of judicial immunity since the judge will perforce become a witness for the defense in any such civil rights action. Even federal judges will find that they become involved when a state prisoner is dissatisfied with a decision in a federal habeas corpus case and alleges a conspiracy on the part of the federal judge together with state officers who do not enjoy either judicial immunity or quasi-judicial immunity, i.e. a state sheriff, a state police officer and others with only good faith immunity.

With respect to this Petition for Certiorari, Respondent prays that the Petition for Writ of Certiorari be denied.

With respect to those petitions generated from the same decision in the United States Court of Appeals for the Fifth Circuit which question the decision that private citizens can be held liable when a conspiracy with

a state judge is alleged, this Respondent would suggest that the importance of that question should prompt the Court to grant certiorari for those petitions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent O. P. Carrillo in Opposition to Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel to the counsel of record in the court below:

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Mr. David V. Herin
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on this the _____ day of March, 1980.

LONNY F. ZWIENER
Assistant Attorney General